UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CREW ONE PRODUCTIONS, INC.

and **Case 10-CA-138169**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

MOTION TO TRANSFER CASE TO AND CONTINUE PROCEEDINGS BEFORE THE BOARD AND FOR SUMMARY JUDGMENT

The above-captioned case is a test of certification of representative issued by the National Labor Relations Board (Board) to the International Alliance of Theatrical Stage Employees (Union) as the exclusive collective-bargaining representative of a unit of certain employees employed by Crew One Productions, Inc. (Respondent). Pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, Series 8, as amended, and in order to effectuate the purposes of the Act and to avoid unnecessary costs and unwarranted delay, Counsel for the General Counsel respectfully moves that the above-captioned case be transferred to and continued before the Board, and that the Board enter summary judgment in this matter.

In support of this motion, Counsel for the General Counsel avers as follows:

1.

On March 17, 2014, the Union filed a petition in Case 10-RC-124620 seeking to represent certain employees of Respondent. A copy of the petition is attached as Exhibit 1.

2.

On April 23, 2014, the Regional Director issued a Decision and Direction of Election directing an election in the following appropriate unit of employees of Respondent:

> All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

A copy of the Decision and Direction of Election is attached hereto as Exhibit 2.

3.

On April 30, 2014, pursuant to the Decision and Direction of Election, the Regional Director issued a letter scheduling the election to be conducted by mail ballot. A copy of the letter is attached hereto as Exhibit 3.

4.

On May 7, 2014, both Respondent and the Union filed a Request for Review of the Regional Director's Decision and Direction of Election. Copies of the Respondent's and Union's Request for Review are attached hereto as Exhibits 4 and 5, respectively.

5.

Pursuant to the Regional Director's Decision and Direction of Election, a mail ballot election was held, and ballots were mailed on May 19, 2014**.** Pursuant to instructions from the Board, the ballots were impounded.

6.

On August 21, 2014, the Board issued an Order denying the Respondent's and the Union's Request for Review. A copy of the Board's Order is attached hereto as Exhibit 6.

7.

On August 27**,** 2014, pursuant to the Board's Order, the impounded ballots were counted and the parties were served with a tally of ballots. The tally of ballots showed that, of approximately 408 eligible voters, 116 cast valid ballots for the Union and 60 cast valid ballots against the Union. There were 26 void ballots and 16 non-determinative challenged ballots. The tally of ballots dated August 27, 2014, disclosed that a majority of the valid votes cast were cast for the Union. A copy of the tally of ballots is attached hereto as Exhibit 7. No objections were filed.

8.

On September 4, 2014, the Acting Regional Director issued a Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of the Unit described above in paragraph 2. A copy of the Certification of Representative is attached hereto as Exhibit 8.

9.

On September 8, 2014, and September 22, 2014, by letter and electronic mail transmission (e-mail), respectively, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative and to bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit described above in paragraph 2. Copies of the Union's letters are attached hereto as Exhibit 9 (a) and 9 (b), respectively.

10.

On September 23, 2014, Respondent, by e-mail refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit described above in paragraph 2. A copy of Respondent's e-mail is attached hereto as Exhibit 10.

11.

On October 3, 2014, the Union filed the charge in the instant case, 10-CA-138169, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, the certified bargaining representative. The charge was served by regular mail on Respondent on October 6, 2014. Copies of the charge and the affidavit of service are attached as Exhibits 11 and 12, respectively.

12.

On October 23, 2014, pursuant to Section 102.15 of the Board's Rules and Regulations, the Acting Regional Director for Region 10 issued complaint in Case 10-CA-138169, alleging that, since September 4, 2014, Respondent has violated Section 8(a)(l) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees. A copy of the complaint was served by certified mail upon the parties to this proceeding. A copy of the complaint and affidavit of service are attached hereto as Exhibits 13 and 14, respectively.

13.

On October 28, 2014, Respondent filed an answer to said complaint, and served a copy thereof on the parties to this proceeding. A copy of Respondent's answer is attached hereto as Exhibit 15.

14.

In paragraph 1 of its answer, Respondent admits to paragraphs 1 through 11 of the complaint. In paragraph 5 of its answer, Respondent admits to paragraphs16 and 17 of the complaint.

In paragraph 2 of Respondent's answer, in response to paragraph 12 of the complaint, Respondent admits that the ballots were counted on August 27, 2014, and a majority of ballots were cast in favor of the Union.

In paragraph 3 of its answer, in response to paragraph 13 of the complaint, Respondent admits that on September 4, 2014, the Acting Regional Director issued a Certification of Representative certifying the Union as the exclusive collective-bargaining representative of Respondent's employees in an appropriate unit.

While admitting to the substantive facts as alleged in paragraphs 12 and 13 of the complaint, Respondent denies that the Unit is comprised of employees within the meaning of the Act. In accordance with the foregoing denial, in paragraph 4 of its answer, Respondent denies paragraphs 14 and 15 of the complaint, denying that the Unit is an appropriate unit for purposes of collective bargaining or that the Union has been the exclusive collective-bargaining representative of the Unit under Section 9(a) of the Act. Consistent with these denials, Respondent denies that its refusal to recognize and bargain with the Union violates Section 8(a)(l) and (5) of the Act or that its conduct affects commerce under the Act. Thus, Respondent denies conclusory paragraphs 18 and 19 of the complaint.

15.

Respondent raises two affirmative defenses in its answer. Respondent's first defense, already referenced above, asserts that the Regional Director and the Board erred in denying the Respondent's Request for Review because the members of the Unit are not employees of Respondent. In its second defense, Respondent asserts that Regional Director and the Board erred by failing to dismiss the petition in Case 10-RC-124620 because "Respondent's hiring hall operated by IATSE, Local 927 directly competes with the Respondent as a labor provider in the Atlanta Metropolitan area." Based on these asserted defenses, Respondent argues that the Union was inappropriately certified in Case 10-RC-124620, and, thus, no obligation to bargain exists.

16.

Counsel for the General Counsel respectfully requests that the Board take administrative notice of all the documents described above in Case 10-RC-124620. Based on the foregoing, pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, Counsel for the General Counsel hereby moves to transfer this case to the Board and to continue proceedings before the Board and for summary judgment in this matter.

ARGUMENT

Although Respondent denies certain allegations of the complaint, its answer fails to raise any material issues of fact, as Respondent admits it has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit. Respondent's answer fails to provide any evidence or assert any issues in

support of its affirmative defenses to the complaint, other than those issues presented by Respondent in the representation proceedings in Case 10-RC-124620. As Respondent admits it has failed to bargain with the Union, Respondent's conduct constitutes a violation of Section 8(a) (1) and (5) of the Act. *See Machine Maintenance, Inc. d/b/a Machine Maintenance and Equipment Company,* 303 NLRB No. 21 (1991)*; Beverly California Corporation,* 303 NLRB N0. 20 (1991).

Notwithstanding Respondent's denials of certain of the complaint allegations, all allegations should be deemed admitted as true. Respondent is seeking to re-litigate issues previously determined in the underlying representation case, 10-RC-124620. The Board and the Courts have consistently held that issues that were or could have been raised and determined by the Board in a prior representation proceeding cannot be re-litigated in a subsequent unfair labor practice proceeding, absent newly discovered evidence, previously unavailable evidence, or special circumstances. Thus, a respondent in a Section 8(a)(l) and (5) proceeding is not entitled to re-litigate issues that were or could have been raised in prior representation proceedings. *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 162 (1941)*;LTV Electorsystems, Inc.* 166 NLRB 938, 939-40 (1967)*, enfd.* 388 F. 2d 683 (4th Cir. 1968)*; Warren Unilube, Inc.* 357 NLRB No. 9, slip op. at 1 (2011)*; Board's Rules and Regulations,* §§ 102.67 and 102.69(c).

Accordingly, as Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding, a hearing is unwarranted in this matter. As there is no genuine issue of fact existing in this case and Respondent has not shown that newly discovered, relevant evidence is now available, the Board should transfer this case and continue the proceedings before it, find the allegations set forth in the complaint to be

true without receiving evidence, grant summary judgment, and issue a Decision and Order finding a violation.

It is respectfully requested that the Board make its findings of fact based on the allegations in the complaint and Respondent's admissions thereto and conclude that, as a matter of law, Respondent has violated Section 8(a)(1) and (5) of the Act. It is also respectfully requested that the Board order an appropriate remedy, including an order that the initial certification year shall be deemed to begin on the date Respondent commences to bargain in good faith with the Union as the certified bargaining representative of the employees in the appropriate Unit. *Mar-Jac Poultry Co., 136 NLRB 786 (1982); Campbell Soup Company*, 224 NLRB 13 (1976); *Commerce Company d/b/a Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (5th Cir. 1964), *cert denied* 379 U.S. 817.

WHEREFORE, because Respondent has failed to raise any issues of material fact requiring a hearing, it is respectfully requested that:

(A) This case be transferred to and continued before the Board;

(B) The allegations of the complaint are found to be true;

(C) This motion for summary judgment be granted; and

(D) The Board issue a Decision and Order containing findings of fact and conclusions of law in accordance with the allegations of the complaint, and remedying Respondent's unfair labor practices by including a provision that, for the purpose of determining the effective date of the Union's certifications, the initial year of certification shall be deemed to begin on the date that Respondent commences to bargain in good faith with the Union, and order any other relief as is deemed just and proper.

Dated this 7th day of November 2014

Respectfully submitted,

Kerstin Meyers
Counsel for the General Counsel
National Labor Relations Board
Region 10

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Transfer Cases and Continue Proceedings Before the Board and for Summary Judgment have this date been served electronically upon the following parties:

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Dated this 7th day of November 2014

Respectfully submitted,

Kerstin Meyers
Counsel for Acting General Counsel
National Labor Relations Board
Region 10

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE	
Case No. **10-RC-124620**	Date Filed **March 17, 2014**

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petition alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1 **PURPOSE OF THIS PETITION** (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the employer named herein, the statement following the description of the type of petition shall not be deemed made.) **(Check One)**

X	**RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
	RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
	RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
	UD-WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
	UC-UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____.
	AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Telephone No. & Fax No
CREW ONE	**Todd Hardison thardison@crew1.com**	**404-350-3541/404-350-3546**

3 Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code)
763 TRABERT AVE NW STE E ATLANTA, GA 30318-4245

4a Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service
Labor service	**ENTERTAINMENT EVENTS**

5 Unit Involved (In UC petition, describe **present** bargaining unit and attach description of proposed clarification.)	6a. No. of Employees in Unit
Included: **SEE ATTACHMENT "A"**	**150** Present
Excluded: **ALL OTHER EMPLOYEES, MANAGERS, SUPERVISORS, CLERICAL AND GUARDS AS DEFINED BY THE ACT.**	Proposed (By UC/AC)

6b Is this petition supported by 30% or more of the employees in the unit? (Not applicable in RM, UC and AC) **YES**

(If you have checked box RC in 1 above, check and complete **EITHER** item 7a or 7b, whichever is applicable)

7a. [ ] Request for recognition as Bargaining Representative was made on and Employer declined recognition on or about ___ If no reply received, so state).

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8 Name of recognized or Certified Bargaining Agent (if none, so state)	Affiliation
Address and Telephone No. & Fax No.	Date of Recognition or Certification

9 Expiration Date of Current Contract, If any (Month, Day, Year)	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day, and Year)
11a. Is there now a strike or picketing at the Employer's establishment(s) involved? **NO**	11b. If so, approximately how many employees are participating?

11c The Employer has been picketed by or on behalf of (Insert Name) . Since (Month, Day, Year)

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above (If none, so state)

Name	Affiliation	Address	Date of Claim (Required only if Petition is filed by Employer)

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name of Petitioner and Affiliation, if any **INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES**

By _____
Signature of Representative or person filing petition Daniel Di Tolla
Title 8th International Vice President/Co-Department Director Stagecraft
Address: 207 W. 25th Street, 4th Floor, New York, N.Y. 10001
TEL. & FAX NO. 212-730-1770; facsimile: 212-730-7809

Exhibit 1

ATTACHMENT A

All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, fork lift operators, personnel lift operators, audio/visual technicians, camera operators, wardrobe attendants, and spot light operators, and other in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events in the Atlanta metropolitan area.

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CREW ONE PRODUCTIONS, INC.[1]

Employer

and Case 10-RC-124620

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES

Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board, during which the parties were given the opportunity to present evidence on the issues raised by the petition and to examine and cross examine witnesses. Both parties filed post hearing briefs which have been duly considered.

In this matter, the Petitioner seeks to represent a unit of all stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events in the

[1] The Employer's name appears as corrected at the hearing.

Atlanta metropolitan area, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.[2]

POSITIONS OF THE PARTIES

During the hearing and in their briefs, the parties disagree on the following issues: (1) whether the petitioned-for unit is comprised of employees within the meaning of Section 2(3) of the Act or independent contractors; (2) whether the Petitioner is a business competitor of the Employer, thereby precluding the Petitioner from representing the unit due to a conflict of interest; and (3) the appropriate voter eligibility formula.

In sum, the Employer contends that it only refers independent contractors; that should a finding be made that the referred staffers are employees rather than independent contractors the Petitioner should be disqualified from representing them because it is a business competitor of the Employer; and that the eligibility formula set forth in *Juilliard School,* 208 NLRB 153 (1974), should be utilized if an election is directed.[3]

The Petitioner contends the individuals referred by the Employer are employees, rather than independent contractors; that it is not a competitor of the Employer and therefore suffers no disabling event which would preclude it from representing the unit employees; and that the

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[2] The parties stipulated that the classifications described constitute the appropriate unit should the Regional Director conclude that the unit sought is comprised of employees rather than independent contractors.

[3] Under that standard, an employee is deemed eligible to vote if the employee has worked at least two events for a total of five working days over a one-year period or who have been employed by the Employer for at least 15 days over a two-year period.

appropriate method of determining eligibility of the employees should be at least two events for a minimum of 120 hours in the year preceding the Decision and Direction of Election.[4]

REGIONAL DIRECTOR'S FINDINGS

Having duly considered the evidence and arguments of the parties, I have concluded the petitioned-for unit is comprised of employees rather than independent contractors and that the Petitioner does not have a disabling conflict which would preclude it from representing the Employer's employees. Accordingly, I will direct an election as set forth below.

1. INDEPENDENT CONTRACTOR ISSUE

The Employer is a Georgia corporation with offices located in Tennessee and Georgia, including an office and place of business located at 763 Trabert Avenue NW, Suite E, Atlanta, Georgia 30318, where it is engaged in providing technical labor staffing, including stagehands for various theatrical and industrial venues.[5] The Employer has been in business since 1992. About 80 percent of the events for which the Employer provides staffing are concerts, plays, and sporting events. The length of the events varies, with most typically lasting one to two days, albeit about 20 events staffed this past year lasted five days or longer. The events staffed by the Employer take place at dozens of venues throughout the Atlanta metropolitan area. In the past year about 85 percent of these events were held at Georgia World Congress Center, Phillips Arena, Georgia Dome, Cobb Galleria, Cobb Energy Performing Arts Center, Verizon Wireless Amphitheatre at Encore Park, Aaron's Amphitheatre at Lakewood, and Gwinnett Arena. The Employer also has contracts, some multi-year, with certain producers and venues to provide labor for their events, including Verizon Wireless Amphitheatre and Aaron's

[4] During the hearing, the Petitioner asserted that the voter eligibility formula should be based on six events and 120 hours. That position was modified in the Petitioner's brief as set forth herein.

[5] In this matter, the Petitioner seeks to represent only those employees referred by the Employer in the Atlanta metropolitan area.

Amphitheatre. The Employer estimates that it provided labor for about 30 events at Aaron's Amphitheatre, about 30 at Verizon Wireless Amphitheatre, about 50 at Phillips Arena, about 35 at Gwinnett Arena and about 10 at Cobb Energy Performing Arts Center in the last year. Work is available all year round but tends to be greater during the summer months when more venues are operating. About 464 workers were paid at least one dollar by the Employer in 2013.

The Employer maintains a database questionnaire that must be completed by applicants interested in securing work with the Employer. These questionnaires are typically completed online and request information regarding skills, certifications, references, education, age, and availability for work. The applicant is then contacted by the Employer and asked to attend an orientation session for general stage hand labor at the Employer's Atlanta office. During the orientation, the applicants receive a packet, which includes documents such as an IRS Form W-9, directions to various venues, an independent contractor agreement, an additional database questionnaire and a list of Employer policies. These policies provide instructions to the applicants regarding dress codes for events, what to bring to an event, the procedures for accepting and declining work, and protocols for interacting with less-than-pleasant tour personnel. Applicants must complete the Form W-9, the additional database form, and the independent contractor form before they are assigned to an event.

Generally, a potential client contacts the Employer to provide labor for its event. The client notifies the Employer of the number and classification of workers it requires and requests an estimate of costs. The Employer then provides the potential client with an estimate. Once a contract is agreed upon, the Employer selects workers from its database and contacts them, normally via email, to determine whether they wish to work that event. The contacted individuals are free to accept or reject any offer of work.

Those individuals who choose to work an event report to the Employer's project coordinator at the venue at a designated time to check in upon arrival and later to check out when they are notified that their work in completed. [6] The client determines when work is to begin but the Employer requires the workers to report up to 30 minutes before the time designated by the client. The workers also report to the project coordinator if it becomes necessary to leave the job prior to completing their work. The project coordinator normally "departmentalizes" the workers, meaning he assigns them to various work classifications such as lighting, sound, rigging, etc., based on that worker's skill set and experience as set forth in his database questionnaire. They are then assigned by the project coordinator to work under the direction of personnel employed by the client.

All of the workers provide their own basic supplies such as hard hats, steel-toe boots and wrenches, while the riggers also provide their own ropes, harnesses and fall-arresting lanyards. The Employer provides reflective vests with the company name printed on them, which the workers are required to wear while at the venue.

The workers are paid for each job on an hourly basis but are normally guaranteed at least four hours' pay. Overtime rates, and when those rates apply, are negotiated by the client and the Employer.

ANALYSIS AND FINDINGS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The burden of proving independent

[6] The parties stipulated that project coordinators are excluded from the unit.

contractor status is on the party asserting it. *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004); see generally, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-712 (2001).

Longstanding Supreme Court and Board precedent have established that common-law agency principles apply in distinguishing between employees and independent contractors under the Act. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *Roadway Package System, Inc.*, 326 NLRB 842 (1998). These principles include: (1) the extent of control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the individual is employed; (7) the method of payment, whether by time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business. *BKN, Inc.*, 333 NLRB 143, 144 (2001). The Board does not consider this list exclusive or exhaustive, however, and will look at all incidents of the employment relationship. *Arizona Republic*, 349 NLRB 1040, 1042 (2007).

The Board has observed that no one factor is decisive, and the same set of factors that is decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may not be entitled to equal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other. *Roadway Package System, Inc.*, supra at 850.

In this case, there is some evidence supportive of independent contractor status. The workers are free to accept or reject offered work without retaliation and are free to accept work from other labor providers. They provide their own basic supplies on the jobs. Taxes are not withheld from their paychecks, and they receive no benefits. Although the Employer provides workers compensation insurance, it is provided at the behest of clients and the associated costs are charged to the client. The Employer mandates that the workers also sign a form designating themselves as independent contractors.

On the other hand, it is clear that the workers perform essential functions of the Employer's operations, inasmuch as the Employer is engaged in the business of providing labor. The workers are normally paid on an hourly basis. Although the Employer asserts that the workers can negotiate their wage rate, there is insufficient evidence in the record to support that assertion. Instead, the record evidence established that the wage rates are unilaterally set by the Employer in advance and those rates are relied upon by the Employer to determine its estimate of labor costs submitted to the client. Although there are a few instances where riggers and camera operators may be paid a daily rate, the record reflects that the daily rate is set by the Employer as well, and, as with workers paid on an hourly basis, there is insufficient evidence of meaningful negotiations between the employer and the workers regarding the daily rates.

While workers are free to accept or reject work, this fact alone does not establish independent contractor status. *Lancaster Symphony Orchestra,* 357 NLRB No. 152 (2011). Unlike a true independent contractor relationship, once a worker accepts an offer from the Employer, the worker has little, if any, control over when his work hours begins or ends. As stated previously, the workers are hourly paid. The work hours are monitored and maintained by the Employer. Therefore, in addition to being required to check in with the Employer at a time

designated by the Employer, a worker who leaves the job prior to completing his assignment must also notify the Employer.

The Employer contends that the workers and the Employer intend for their relationship to be that of an independent contractor rather than employer/employee. Although the applicants sign independent contractor agreements and taxes are not withheld from their pay, the record reflects that no meaningful number of individuals voluntarily signed the independent contractor agreement. Rather, it appears that they execute the agreement because it is required in order to work for the Employer. Moreover, the Board does not regard as determinative the fact that a written agreement may define a relationship as that of an independent contractor, *Big East Conference*, 282 NLRB 335 (1986); or that an employer fails to withhold standard payroll deductions, *Miller Road Dairy*, 135 NLRB 217, 220 (1962). In addition, although the workers supply their own basic tools, the record reflects that this is common among stagehands and riggers in the industry.

In short, although the record reflects the presence of some factors demonstrating independent contractor status, those factors are insufficient to meet the Employer's burden of establishing such status where, as here, there are other more compelling factors supporting a finding that the workers are employees. *BKN, Inc.*, supra; *Roadway Package Systems, Inc.*, supra. Accordingly, I find that the individuals in the appropriate unit are employees within the meaning of Section 2(3) of the Act.

2. BUSINESS COMPETITOR ISSUE

During the hearing, evidence was presented that IATSE Local 927, a local of the Petitioner, operates a hiring hall which provides labor in the entertainment industry with employers with which it has collective bargaining agreements. Local 927 is signatory to standard

collective bargaining agreements with the Atlanta Ballet, the Atlanta Opera and the Fox Theater. When those employers need employees, they contact Local 927 for referrals. Similarly, employers who are not signatory to an existing agreement that wish to utilize the services of the hiring hall contact Local 927 and enter into a collective bargaining agreement before workers are referred. Agreements lasting less than a year are called "one off contracts." Local 927 does not actively solicit employers to refer employees.

There is no evidence that any of contracts referred to above require employers to pay Local 927 a fee for services rendered. Persons referred are treated as employees of the employer to which they are referred, not of Local 927. Local 927 generates funds to operate its hiring hall by assessing an annual referral fee on non-members and a work fee assessed per event to all individuals, based on the gross wages earned from each job acquired as a result of a referral through the hiring hall. There is no evidence that Local 927 realizes a financial profit from operating its hiring hall.

The Employer and the Petitioner agree that there is some overlap between individuals in the Employer's database and those on the Local 927 hiring hall referral lists. In fact, the Employer encourages its employees to seek work through other labor providers as well as through the Employer.

No evidence was presented as to the business relationship between the Petitioner and Local 927 or whether the Petitioner has any involvement in the operation of the hiring hall by Local 927.

ANALYSIS

In order to establish that a union has a conflict of interest sufficient to bar it from representing an employer's employees, the employer must demonstrate a clear and present

danger that the conflict will render the union unable to rigorously represent the employees in the bargaining process. The burden on the party asserting the conflict is a heavy one. *Supershuttle International Denver, Inc.*, 357 NLRB No. 19 (2011).

Initially, I note that it is Local 927, not the Petitioner, that operates a hiring hall. More than a mere affiliation between the Petitioner and Local 927 is necessary to place responsibility of the actions of Local 927 onto the Petitioner. As the Employer has failed to establish that the Petitioner is involved in the operation of the hiring hall or that it controls the operations of Local 927, I find that the Employer has failed to establish the Petitioner, rather than Local 927, may have a potentially disqualifying conflict.

Moreover, assuming for the sake of argument only that Local 927 and the Petitioner are involved in the operation of the hiring hall, I do not find its operation to be a disqualifying event. The Employer's reliance on the cases showing conflict of interest is misplaced as these cases are distinguishable. In *Bausch and Lomb Optical Co.*, 108 NLRB 1555 (1954), the union established and operated a company which directly competed with the Employer. In *Bausch and Lomb*, the Board was concerned that the union would seek to protect and enhance its business interests rather than the interests of the unit employees. In the instant case, however, Local 927 does not operate a business in competition with the employer. Instead, the hiring hall only takes in referral fees on a per capita basis and therefore would only receive money when workers are assigned work by the Employer. It therefore is illogical to believe that the Petitioner would advance positions which negatively impact unit employees being assigned work by the Employer.

St. John's Hospital, 264 NLRB 990 (1992) and *Visiting Nurses Assn.*, 188 NLRB 155 (1971), both involve nurse registries operated by unions that were licensed business entities

rather than hiring halls. In *St. John's Hospital*, the registry referred nurses to the employer's hospital and received referrals of patients from the employer. The union exercised complete control over the registry and the employer paid the union for use of the registry's services. The Board found the fact that the employer was a customer of the union created a conflict of interest for the union. The Board also noted in that case that if the union referred nurses only to prospective employers who were signatory to collective bargaining agreements with the union, then the registry may qualify as a hiring hall and would therefore not pose a conflict as found in that case. Here, there is no business relationship between Local 927 and the Employer such as that demonstrated by the facts in *St. John's Hospital*. Further, the Local 927 hiring hall refers individuals only after there is a signed collective bargaining agreement with that production or venue.

Based on the above, the Employer has failed to establish that there is a conflict of interest sufficient to preclude the Petitioner from representing the Employer's employees.

3. APPROPRIATE ELIGIBILITY FORMULA

The Employer and the Petitioner disagree regarding the appropriate voter eligibility formula in this case. The Employer asserts that voting eligibility should be afforded to all employees who have been employed by the Employer during two productions for a total of five working days over a one-year period, or for at least 15 days over a two-year period. *Juilliard School*, 208 NLRB 153 (1974). The Petitioner contends that the proper voter eligibility formula should be applied to all employees who were employed by the Employer during at least two events for a minimum of 120 working hours in the year preceding the date of this Decision similar to the eligibility formula set forth by this Region in its Decision and Direction of Election in *Clear Channel d/b/a Oak Mountain Amphitheatre,* Case 10-RC-15344.

The record reveals that in 2013, the Employer provided labor for about 185 events at larger venues. This number accounted for about 85 percent of the total number of events the Employer worked. Therefore, the Employer provided labor for about 220 events in 2013. There were 544 individuals who worked at least one day for the Employer between March 17, 2013, and March 17, 2014, of whom about 376 worked at least five days for the Employer during that time period. Most events in the past year were one to two days in length, while only about 20 events were five days or longer during that time period. During the days of their assignments, about two-thirds of the riggers complete their tasks within four hours at a typical event, whereas most stagehands work over 4 hours, at least on the larger events.

ANALYSIS

In devising eligibility formulas to fit the unique conditions of a specific industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). In the different areas of the entertainment industry, the Board has been flexible in devising eligibility formulas, in recognition of the fact that employees are frequently hired on a day-by-day or production-by-production basis. *DIC Entertainment, L.P.*, 328 NLRB 660 (1999). In doing so, the Board stated that it is its responsibility to devise an eligibility formula that is "compatible with our obligation to tailor our general eligibility formulas to the particular facts of the case." *American Zoetrope*, supra. Thus, in *Medion, Inc.*, 200 NLRB 1013 (1972), employees who were employed on at least two productions for a minimum of 5 working days in the year preceding the issuance of the Decision were deemed eligible to vote. In *American*

Zoetrope, the Board eliminated the 5-day requirement on a showing that, unlike in *Medion*, most unit jobs lasted only 1 or 2 days.

In *Clear Channel d/b/a Oak Mountain Amphitheater*, cited by the Employer, the Board granted review of a regional director's Decision in which he applied a variant of the *Medion* formula to a unit of stage hands and related employees similar to the unit at issue here. The Board invited briefs addressing whether the Board should reconsider the entertainment eligibility formulas set forth in *Medion*, *American Zoetrope*, and related cases. The Board determined it was "unnecessary to reevaluate the eligibility formulas in this industry" and decided the case based on existing precedent. *Oak Mountain*, supra, slip op. at 4. The Board found that the employer's shows lasted only one to three days, with the majority lasting only one day. The Board determined that an employee successfully completing two projects for the employer was a more significant indication of future employment than the total number of hours worked. Thus, the Board eliminated the hours of work requirement found by the regional director and held that the *American Zoetrope* standard of two shows in the year prior to the issuance of the Decision and Direction of Election applied.

In light of the above, I find that a unit eligibility formula based on the number of days assigned to those on the referral list rather than hours of work is the most significant indication of future employment with the Employer. However, given the large number of work opportunities available to employees in the instant matter, I believe that to eliminate casual employees from those truly interested in continued employment with the Employer, the eligibility formula should be modified slightly to include at least two events or five work days,

regardless of length of those days, during the year preceding issuance of this Decision and Direction of Election. This formula would enfranchise approximately 376 employees.[7]

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. As stipulated by the parties, the Employer is engaged in commerce within the meaning of the Act. Accordingly, it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> "All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

[7] The 120 hour requirement as proposed by the Petitioner would reduce the unit size to approximately 221 employees.

DIRECTION OF ELECTION

Inasmuch as the employees are scattered throughout the Atlanta metropolitan area and do not regularly report to a location of work under the control of the Employer, a manual election is not feasible in this matter. Accordingly, the National Labor Relations Board will conduct a secret-ballot election by mail among the employees in the unit found appropriate above. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Alliance of Theatrical Stage Employees. The date, time, and place of the mail ballot election will be specified in the Notice of Election that will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote are those in the all unit employees who were employed by the Employer on at least two events or five work days, regardless of length of those days, during the year preceding issuance of this Decision and Direction of Election and who were not terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Ineligible to vote are employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility,* 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the National Labor Relations Board Atlanta Regional Office, 233 Peachtree Street, NE, Harris Tower, Suite 1000, Atlanta, Georgia 30303-1531, on or before **April 30, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlrb.gov, by mail, by hand or courier delivery, or by facsimile transmission at (404) 331-2858. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending

list electronically, go to the Agency's website at www.nlrb.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

C. Notice Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 full working days prior to 12:01 am of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election. The term "working day" shall mean the entire 24-hour period excluding Saturday, Sundays and holidays. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by 5:00 P.M., (EDT) on **May 7, 2014**. The request may be

filed electronically through E-Gov on the Board's web site, www.nlrb.gov,[8] but may not be filed by facsimile.

DATED this 23rd day of April 2014, at Atlanta, Georgia.

Claude T. Harrell Jr., Regional Director
Region 10
National Labor Relations Board
233 Peachtree Street, NE
Harris Tower, Suite 1000
Atlanta, Georgia 30313-1531

[8] To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CREW ONE Employer and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES Petitioner	CASE **10-RC-124620**

AFFIDAVIT OF SERVICE OF: DIRECTION AND DECISION OF ELECTION, dated April 23, 2014.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on **April 23, 2014**, I served the above-entitled document(s) **regular mail** upon the following persons, addressed to them at the following addresses:

J. Y. ELLIOTT, III, ESQ.
MILLER & MARTIN, PLLC
832 GEORGIA AVE STE 430
CHATTANOOGA, TN 37402-2263

W. RANDALL WILSON, ESQ.
MILLER & MARTIN, PLLC
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TODD HARDISON
CREW ONE
763 TRABERT AVE NW STE E
ATLANTA, GA 30318-4245

DANIEL DITOLLA, 8TH INTERNATIONAL
VICE PRESIDENT/CO-DEPARTMENT
DIRECTOR STAGECRAFT
INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES
207 W 25TH ST, 4TH FLOOR
NEW YORK, NY 10001-7119

WILLIAM G. TRUMPETER, ESQ.
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QUINN, CONNOR, WEAVER,
DAVIES & ROUCO LLP
2700 HIGHWAY 280 EAST STE 380
BIRMINGHAM, AL 35223

TESSA WARREN, ESQ.
QUINN CONNOR,WEAVER, DAVIES &
ROUCO LLP
3516 COVINGTON HIGHWAY
DECATUR, GA 30032

April 23, 2014
Date

Joselle Chatman,
Designated Agent of the NLRB
Name

Joselle Chatman
Signature

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 10
233 Peachtree St NE
Harris Tower Ste 1000
Atlanta, GA 30303-1504

Agency Website: www.nlrb.gov
Telephone: (404)331-2896
Fax: (404)331-2858

April 30, 2014

J. Y. Elliott, ESQ.
Miller & Martin, PLLC
832 Georgia Ave Ste 430
Chattanooga, TN 37402-2263

Tessa Warren, ESQ.
Quinn Connor Weaver Davies & Rouco LLP
3516 Covington Highway
Decatur, GA 30032

Re: CREW ONE PRODUCTIONS, INC.
Case 10-RC-124620

Dear Mr. Elliott, Ms. Warren:

This letter will confirm the details of an election arranged in the above matter pursuant to the Regional Director's Decision and Direction of Election. It also provides information about posting the election notices.

As set forth in the Decision and Direction of Election, this election will be conducted using the mail ballot voting procedures. Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

Election Arrangements

The arrangements for the election in this matter are as follows:

Date Parties Must Advise Regional Office of Additions to Voter Eligibility List: May 7, 2014

Date and Time Mail Ballots to be Sent to Voters: May 19, 2014 at 4:00 p.m.

Date Voters Are Requested to Notify Regional Office if Mail Ballot Not Received or Replacement Ballot Is Needed: May 28, 2014

Date Mail Ballots From Voters Must Be Received by Regional Office: June 10, 2014

Date, Time and Place of Ballot Count: The ballot count will be held on June 11, 2014 at 2:00 p.m. at the Atlanta Regional Office. Representatives of the parties are invited to attend and observe the ballot count at which time they must voice any challenges to any of the ballots.

Exhibit 3

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, if special accommodations are required for any voters, potential voters, or election participants to vote, please tell the Board agent as soon as possible.

Posting of Election Notices

Election notices will soon be mailed to the parties. Section 103.20 of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places. In this case, the notices must be posted **before 12:01 a.m. on May 14, 2014.** If the Employer does not receive copies of the notice by May 12, 2014, it should notify the Regional Office immediately. Pursuant to Section 103.20(c), a failure to do so precludes an employer from filing objections based on nonposting of the election notice.

If there are any questions, please feel free to contact Field Examiner NICOLE DEITMAN at telephone number (404) 331-2854 or by email at nicole.deitman@nlrb.gov. The cooperation of all parties is sincerely appreciated.

Very truly yours,

Claude T Harrell Jr

CLAUDE T. HARRELL JR.
Regional Director

Enclosure: Designation of Observer Form

cc:

W. Randall Wilson, ESQ.
MILLER & MARTIN, PLLC
832 Georgia Ave Ste 430
Chattanooga, TN 37402-2263

Scott E. Simmons, ESQ.
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DANIEL DITOLLA, 8TH INTERNATIONAL
VICE PRESIDENT/CO-DEPARTMENT DIRECTOR
STAGECRAFT INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
207 W 25TH ST, 4TH FLOOR
NEW YORK, NY 10001-7119

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CREW ONE PRODUCTIONS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,	)	**Case No. 10-RC-124620**
	)	
	)	
Petitioner.	)	

CREW ONE'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

CREW ONE PRODUCTIONS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,	)	**Case No. 10-RC-124620**
	)	
	)	
Petitioner.	)	

CREW ONE'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION

Comes now the Employer, Crew One Productions, Inc. ("Crew One"), by counsel and pursuant to 29 C.F.R. § 102.67, and submits its Request for Review of the Decision and Direction of Election ("Decision") issued by the Board's Region 10 Regional Director ("Regional Director").

I. STATEMENT OF THE CASE

On March 17, 2014, Petitioner filed a Petition for Representation ("Petition") with the Board, seeking certification as representative of the following contractors[1] to whom Crew One refers work:

> All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, fork lift operators, personnel lift operators, audio/visual technicians, camera operators, wardrobe attendants, and spot light operators, and other[s] in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events in the Atlanta metropolitan area.

(Board Exh. 1(a)).[2] Crew One denies that the contractors to whom Crew One refers work are "employees," as that term is defined under the National Labor Relations Act ("NLRA" or the

[1] It remains Crew One's position that these individuals are independent contractors, and they will be referred to herein either as "workers" or "contractors."

"Act"), or that the workers have ever been employees of Crew One. As a result, Petitioner's representation of these individuals is inappropriate under the Act. The Regional Director, however, improperly determined that the workers are "employees" under the Act. (Decision, 3).

Crew One further asserts that Petitioner is a direct competitor of Crew One. Thus, certification of the Petition was improper, because that decision granted dual status to the Petitioner both as a bargaining agent and a business competitor to Crew One, rendering it an improper representative of the workers to whom Crew One refers work. The Regional Director improperly found that the Petitioner "does not have a disabling conflict which would preclude it from representing" Crew One's workers. (Decision, 3).

On April 3-4, 2014, a hearing was conducted before Hearing Officer Lauren Rich at the Board's Atlanta, Georgia regional office. On April 23, 2014, the Regional Director issued the Decision, from which Crew One now submits this Request for Review.

II. CREW ONE'S BUSINESS

Crew One was founded in 1992 as a labor referral service for various productions, performances and events including, without limitation, concerts, religious events, corporate trade shows, entertainment events, athletic contests and graduations. (V-I, pp. 25, 27).[3] Crew One refers labor for events at dozens of venues throughout the greater Atlanta metropolitan area, among them Aaron's Amphitheatre at Lakewood, the Verizon Wireless Amphitheatre at Encore Park, Philips Arena, Gwinnett Arena, the Georgia Dome, the World Congress Center and the Cobb Energy Centre. (V-I, pp. 110, 166).

[2] The Board's hearing exhibits are cited herein as "Board Exh. ____."

[3] Relevant portions of the petition hearing transcript are cited herein as "V-__, p. __."

To that end, Crew One has developed and maintains a database of workers who have indicated an interest in providing labor services for events in the Atlanta metropolitan area, and who have indicated an interest in being referred to provide such work by Crew One. (V-I, pp. 25, 38). The database has been developed through information provided by workers in a generic database questionnaire, through which the workers indicate their daytime availability, nighttime availability and their skills and certifications. (Exh. 5).[4]

Typically, Crew One will receive a call from a client (*i.e.*, an event producer or organizer), during which the client will indicate the need for a number of workers to fill specific job functions related to the load-in, construction, performance and load-out of an event. (V-I, p. 26). Upon finalizing an arrangement with the producer or organizer, Crew One fills the call for labor by notifying workers in its database of an opportunity to work an event. Specifically, Crew One contacts workers in the database via e-mail, asking whether or not the worker is interested in providing labor for the event in question. (V-I, p. 58). The worker then has the option either to accept or reject the opportunity as he or she sees fit, at his or her sole discretion. (V-I, p. 58).

If the worker accepts the event opportunity, he or she then checks in at the event venue with a project coordinator and is "departmentalized," at which point he or she reports to and comes under the direct supervision of event personnel.[5] (V-I, pp. 53-54, 128). Departmentalization refers to taking the workers and matching their skill set (as self-reported in their database questionnaire) to the event producer's expressed needs for that event. (V-I, p. 53). The event personnel then monitor, instruct and control the workers in the performance of the necessary work. (V-I, p. 128). Once the event personnel instructs the worker that his or her

[4] Relevant exhibits presented at the hearing are cited herein as "Exh. __."

[5] The "event personnel" are employed by the event, be it a concert, sporting event, touring group, etc., and are <u>not</u> Crew One employees or personnel. (V-I, pp. 90, 127-28).

services are no longer needed, the worker typically "checks out" from the event with the project coordinator.[6] (V-I, p. 128).

III. LAW & ARGUMENT

A. Standard of Review.

A request for review of a regional director's Decision may be granted for any of the following reasons:

1. A substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent;
2. The regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
3. The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
4. There are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(c).

In the instant case, the Regional Director's decision fails on two counts. First, the Regional Director's decision not only misapplied, but seemingly completely ignored the well-established record in this case regarding the workers' status as independent contractors. Specifically, the Decision incorrectly noted the following:

> although the record reflects the presence of some factors demonstrating independent contractor status, those factors are insufficient to meet the Employer's burden of establishing such status where, as here, there are other more compelling factors supporting a finding that the workers are employees.

[6] Often, the worker has agreed to provide both load-in and load-out services. On such occasions, following completion of the load-in, the event personnel determines the proper time when the workers need to return to the venue to begin the load-out process. (V-I, p. 59).

(Decision, 8). Summarily, this assertion is patently false. To the contrary, the Regional Director's analysis, rather than focusing on any allegedly "more compelling factors" supporting a finding that the workers are employees, instead spends his energy downplaying the numerous factors tilting in Crew One's favor.

Second, substantial questions of law have been raised because of the Regional Director's failure to cite any controlling authority for his determination that: (1) the workers in question are not independent contractors; and (2) the Petitioner is not a direct competitor of Crew One. Regarding the contractor/employee analysis, the Regional Director cited nothing in support of his position that the workers are employees, even though the vast majority of factors tilt heavily in Crew One's favor.

Regarding the conflict-of-interest issue, the primary focus of the Regional Director's analysis was on the following:

> Initially, I note that it is Local 927, not the Petitioner, that operates a hiring hall. More than a mere affiliation between the Petitioner and Local 927 is necessary to place responsibility of the actions of Local 927 onto the Petitioner. As the Employer has failed to establish that the Petitioner is involved in the operation of the hiring hall or that it controls the operations of Local 927, I find that the Employer has failed to establish the Petitioner, rather than Local 927, may have a potentially disqualifying conflict.

(Decision, 10). This issue was <u>never</u> addressed at the hearing in any way, shape or form. Even the Petitioner never asserted this theory as a basis for its position that it was not a competitor to Crew One. Moreover, the Regional Director's decision regarding the conflict-of-interest issue was based heavily on the erroneous factual assertion that "the Local 927 hiring hall refers individuals only after there is a signed collective bargaining agreement with that production or venue." (Decision, 11). Standing alone, this mischaracterization of the operation of the Local 927 hiring hall constitutes substantial error prejudicial to Crew One.

B. The Regional Director's Decision on Substantial Factual and Legal Issues is Clearly Erroneous on the Record, Thus Prejudicially Affecting Crew One's Rights.

Under the NLRA, only "employees" have the right to organize or bargain collectively through representatives. 29 U.S.C. § 157. Any individual having the status of an independent contractor, however, is specifically exempted from the statutory definition of "employee." 29 U.S.C. § 152(3).

1. The Common-Law Agency Test.

In determining whether a worker should be classified as an employee or independent contractor, the Board applies the common-law agency test, considering all incidents of the worker's relationship with the company. Argix Direct, Inc., 343 NLRB 1017, 1020 (2004) (citing Roadway Package Sys., 326 NLRB 842, 850 (1998)). Under this test, an employer-employee relationship exists where the company for whom the work is performed retains the right to control the manner and means by which the result is to be accomplished. Lakes Pilots Ass'n, Inc., 320 NLRB 168, 173 (2004). Conversely, where control is reserved only as to the result sought, the relationship is that of an independent contractor. Id. at 173. See also NLRB's Outline of Law & Proc. in Representation Cases, p. 216 (citing Lakes Pilots with approval).

Ultimately, the determination of independent contractor status is fact-intensive. Id. at 1020 (citing N.L.R.B. v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)). Although the same factor may be present in different cases, it may be entitled to differing weight in each case, as the factual background may make that factor more meaningful in one case than in the other case. Argix Direct, Inc., 343 NLRB at 1022. Although no "exhaustive" list of factors is determinative, the Board has frequently found the following factors to be persuasive:

1. Whether the company has the right to control the manner and means of the worker's performance of the work;

2. Whether the worker enjoys the potential for entrepreneurial gain;

3. Whether the company or the worker supplies the instrumentalities and tools necessary for the worker's performance of the work;

4. The skill required in the worker's performance of the work;

5. The intent of the parties (*i.e.*, whether the parties believe they are creating an employment relationship);

6. The method of payment;

7. The worker's discretion to work when he or she chooses, and for how long;

8. The location of the work;

9. Whether the company has the right to assign additional projects to the worker;

10. The provision of benefits; and

11. The tax treatment of the worker.

See, *e.g.*, Arizona Republic, 349 NLRB 1040, 1042 (2007); St. Joseph News-Press, 345 NLRB 474, 477 (2005); Pennsylvania Acad. of the Fine Arts, 343 NLRB 846, 846 (2004).

As discussed herein, each of these factors necessitates the finding that the workers to whom Crew One refers work are independent contractors. Unfortunately, the Regional Director, in a decision that overwhelmingly ignored the wealth of record evidence in Crew One's favor, erroneously determined, with very little factual support and no legal support, that the workers are employees.

2. The Regional Director's Decision Regarding the Workers' Employee Status Both Mischaracterizes Relevant Facts and Misapplies the Appropriate Legal Analysis.

In his Decision, the Regional Director sets forth the following lonely one-paragraph explanation for why the workers in question are more akin to employees than independent contractors:

> On the other hand, it is clear that the workers perform essential functions of the Employer's operations, inasmuch as the Employer is engaged in the business of providing labor. The workers are normally paid on an hourly basis. Although the Employer asserts that the workers can negotiate their wage rate, there is insufficient evidence in the record to support that assertion. Instead, the record evidence established that the wage rates are unilaterally set by the Employer in advance and those rates are relied upon by the Employer to determine its estimate of labor costs submitted to the client. Although there are a few instances where riggers and camera operators may be paid a daily rate, the record reflects that the daily rate is set by the Employer as well, and, as with workers paid on an hourly basis, there is insufficient evidence of meaningful negotiations between the employer and workers regarding the daily rates.

(Decision, 7). Not only does the Regional Director's explanation misconstrue and, more importantly, blatantly ignore the record, but it is also woefully insufficient to establish that the workers are, in fact, employees. Consider the following myriad factual errors and mischaracterizations:

1. At the outset, the Regional Director suggests that "it is clear that the workers perform essential functions of the Employer's operations, inasmuch as the Employer is engaged in the business of providing labor." (Decision, 7). This claim is incorrect. Specifically, while Crew One is a labor provider, the individuals to whom Crew One provides work are not mere laborers. Instead, these individuals include technically-skilled riggers, forklift operators, lighting technicians, carpenters, electricians, audiovisual technicians and camera operators, who are in the business of providing rigging, forklift, lighting, carpentry, electrical, audiovisual and camera services in the entertainment and other industries. (Decision, 1). These individuals refer to themselves as having specific skill sets and hold themselves out to provide those services to others. For example, a rigger may provide rigging services when referred by Crew One, but he might also provide rigging services as part of a multi-show, multi-location

production. (V-I, pp. 39, 194). The Board has recognized such distinctions. See Pennsylvania Acad., 343 NLRB 846, 847 (2004) (explaining that the employer is in the business of providing instruction to art students, while models are in the different business of modeling).

2. The Regional Director emphasizes that "there is insufficient evidence in the record to support" the proposition that the workers can negotiate their hourly or daily wage rate. However, consider the following contradictory testimony from Jeff Jackson, Crew One's General Manager:

> Question: Is there any opportunity for negotiations between the workers and Crew One over the rate they will be paid for the work they do?
>
> Answer: Yes.
>
> Question: Can you explain?
>
> Answer: Workers have the opportunity to negotiate for a different rate, a lot of times where people will negotiate for a higher rate for travel. We don't pay for travel, but they will negotiate a higher rate or day rate because of the fact that they come from further away. Some workers will negotiate to where they actually get more than what a four-hour minimum would be billed.
>
> …
>
> That they would negotiate with us that if they do this show, that, you know, they would have to get six hours or they're not going to take the call.

(V-I, pp. 62-63). As a result, the Regional Director's assertion that "there is insufficient evidence of meaningful negotiations between the employer and the workers regarding the daily rates" is incorrect. (Decision, 7). More importantly, the Regional Director placed heavy emphasis on this fact (and little else) in the Decision, all while completely ignoring the record from the hearing.

3. The Regional Director concedes that "workers are free to accept or reject work," but asserts that "this fact alone does not establish independent contractor status." (Decision, 7). Succinctly, the Regional Director accomplishes nothing more with this statement than simply stating the obvious. While true that no one factor, in isolation, can establish independent contractor status, the Regional Director uses this same analysis on multiple occasions, giving credence to the proposition that a multitude of factors actually weigh in Crew One's favor. For example, later in the Decision, the Regional Director posits that "the Board does not regard as determinative the fact that a written agreement may define a relationship as that of an independent contractor, or that an employer fails to withhold standard payroll deductions." (Decision, 8) (citations omitted). The Regional Director explicitly further acknowledges that the workers: (a) are free to accept work from other labor providers; (b) provide their own "basic supplies" on the job; (c) have no taxes withheld from their paychecks; and (d) receive no benefits. (Decision, 7). As a result, while the Regional Director is correct that no single factor can tip the scale in favor of contractor status, Crew One has tipped the scale over.

4. The Regional Director also attempts, by noting that the worker has "little, if any, control over when his work hours begins or ends" to downplay the fact that the workers are free to accept or reject work (with no repercussions) as they deem fit. (Decision, 7). This distinction completely omits the fact that, once a worker is "departmentalized" upon reporting to an event, he or she is under the complete control and direction of Crew One's clients. One worker characterized this mode of operation as follows:

Question: If a tractor-trailer pulled up to the loading dock back there, you all got started working on it, would you have a clue what to do with the equipment?

Answer: Not until the tour personnel tells us what to do.

Question: Are any two shows identical?

Answer: No, sir.

Question: Is there a great deal of variety between the equipment used?

Answer: Yes, sir. It's all different.

Question: A great deal of variety between the sets that are used?

Answer: Yes, sir.

Question: And does Crew One put on any shows itself?

Answer: No, sir. They don't.

Question: Who do you have to depend on to know where to take a piece of equipment off of a truck?

Answer: The tour personnel that we're assigned to.

Question: Who do you have to depend upon to know where to set something up?

Answer: The tour personnel that we're assigned to, to work for.

Question: Who monitors, instructs and controls your work on one of these projects?

Answer: The tour personnel that we're assigned to.

Question: What sort of – we talked a little bit about your hours; we talked about the minimum. Let's see, who determines when you're done working on a project?

Answer: The client determines when we're done.

(V-I, pp. 127-28). In other words, once the workers "check in" with the Project Coordinator, Crew One's involvement with the workers is complete until the workers "check out" after tour personnel release them to go home. Often, this

period of time during which the workers are subject to Crew One supervision spans many hours. (V-I, p. 149). Conversely, the workers spend mere minutes under the guise of Crew One personnel for the sole purpose of checking in and checking out with the Project Coordinator. Succinctly, the workers' hours are dictated not by Crew One, but by the touring personnel.

5. Further, the Regional Director's assertion that the "work hours are monitored and maintained by the Employer" is of no consequence. (Decision, 7). Of course Crew One maintains time records; otherwise, the workers don't get paid. Such "monitoring" and "maintenance" has no bearing whatsoever on whether or not Crew One controls the manner and means of the work performed. Finally, the contention that "the worker has little, if any, control over when his work hours begins or ends" is also incorrect. (Decision, 7). For example, one of Crew One's workers testified as follows:

> Question: But if you are working the load-in, are you expected to work the full load-in until the job is completed?
>
> Answer: Well, as an independent contractor, if something comes up – for instance, I just had a baby, you know, I had to – I came in, I was only there for maybe 30 minutes, 45 minutes, and had to leave, you know. Of course, that's probably the same way with any job, if there's an emergency – but, you know, as an independent contractor, it's kind of an open-door policy. I mean, there's not a whole lot they can do to me if I decided that, you know, I had to be somewhere that had importance.

(V-I, p. 162). As a result, while workers are generally expected to arrive and leave at certain times, no repercussions are exacted on workers either for arriving late or leaving early, which hardly indicates "employee" status.

6. The Regional Director also incorrectly asserts that "no meaningful number of individuals voluntarily signed the independent contractor agreement." (Decision, 8). To the contrary, every individual to whom work is referred by Crew One voluntarily executes the independent contractor agreement. The workers have the right not to sign the agreement if they wish not to be referred work by Crew One. More importantly, the Regional Director cites no authority for the proposition that requiring an independent contractor agreement as a prerequisite for performing work should affect the analysis in any way regarding whether or not the parties intend to create an employment relationship.

7. To that end, the Decision regarding contractor/employee status is entirely devoid of *any* legal authority supporting the Regional Director's decision. In fact, the only authority cited by the Regional Director are three cases attempting to diminish facts that actually weigh in Crew One's favor. The entirety of authority cited by the Regional Director to support his Decision is cited below:

   (a) While workers are free to accept or reject work, this fact alone does not establish independent contractor status. Lancaster Symphony Orchestra, 357 NLRB No. 152 (2011).

   (b) The Board does not regard as determinative the fact that a written agreement may define a relationship as that of an independent contractor, Big East Conference, 282 NLRB 335 (1986); or that an employer fails to withhold standard payroll deductions, Miller Road Diary, 135 NLRB 217, 220 (1962).

This constitutes the beginning and end of the case law provided by the Regional Director to bolster his decision that the workers in question are not independent contractors. Surely the Regional Director must show more.

8. The Regional Director further asserts that the workers are required "to report up to 30 minutes before the time designated by the client." (Decision, 5). Again, the Regional Director fails to tell the whole story. Instead, one of the workers testified that "they'd like us to be there 30 minutes before our start time, but as long as we're there before our start time, there's no sort of penalty for that." (V-I, p. 164). Clearly, Crew One's ability to control the manner and means of directing the work is vastly limited in scope.

9. The Regional Director also misrepresents Crew One's business model. He notes that the "Employer also has contracts, some multi-year, with certain producers and venues to provide labor for their events." (Decision, 3). While Crew One does have an agreement with two venues – Aaron's Amphitheatre at Lakewood and the Verizon Wireless Amphitheatre at Encore Park – it has no such arrangements with any "producers."[7] The record is devoid of any evidence to the contrary and, to the extent the Regional Director relied on the inaccurate presumption that Crew One "employs" individuals by virtue of long-term agreements with various producers, his assertion is grossly inaccurate.

10. Ultimately, the Regional Director comes to the following conclusion:

> In short, although the record reflects the presence of some factors demonstrating independent contractor status, those factors are insufficient to meet the Employer's burden of establishing such

[7] The event-specific contracts Crew One enters into with a producer are equivalent to the "one-off" contracts Local 927 enters into with producers. (V-II, pp. 303-04).

> status where, as here, there are other more compelling factors supporting a finding that the workers are employees.

(Decision, 8). Noticeably absent from the Regional Director's analysis, however, is an indication of what these "more compelling factors" actually are. Instead, other than what has been set forth previously herein, the Regional Director has provided no evidence of any kind (either factually or legally) that the workers to whom Crew One refers work are more akin to employees than independent contractors.

3. The Regional Director's Decision Regarding the Workers' Employee Status Omits any Analysis of the Common-Law Agency Factors.

At the outset of his analysis, the Regional Director sets forth a version of the common-law agency test, but then largely neglects to analyze the factors detailed in that test. Instead, he strangely omits any analysis of the relevant factors, nearly all of which lean in favor of independent contractor status.

a. Crew One controls neither the manner nor the means by which the workers perform their work (Factor #1).

Upon arriving at a performance or event, workers "sign in" with the project coordinator,[8] are departmentalized and then report to (and work under the direct supervision of) event personnel. (V-I, pp. 53-54, 67). The event personnel direct the workers as they perform the necessary work. (V-I, pp. 127-28). Once departmentalized, the workers are entirely at the disposal of event personnel overseeing the various departments, and they receive no instructions from Crew One personnel while performing work. (V-I, pp. 127-28). In fact, Crew One affirmatively established that tour personnel: (a) direct setup and breakdown of the show's

[8] The project coordinator is likewise a contractor. (V-II, p. 254). For purposes of this action, the project coordinators are not included in the Petitioner's proposed unit, and have been explicitly excluded from the proposed unit description by the parties. (Id.).

equipment; and (b) "monitor, instruct and control" the work performed at the venue. (V-I, p. 128).

Thus, Crew One never controls either the manner or means by which the workers perform their jobs. In fact, Crew One's subcontractor information packet clearly mandates that the tour or event personnel (who are not Crew One personnel or employees) serve as the workers' "boss for the day." (V-I, p. 57).[9] The touring personnel "are the ones that determine how it's done and the manner in which it's put together, where things go, that sort of thing." (V-I, pp. 57-58). See, *e.g.*, Arizona Republic, 349 NLRB 1040, 1043 (2007) (factor of "control" weighed in favor of finding that newspaper carriers were independent contractors, because the company "exercised little control" over the carriers, even though the carriers had to complete delivery by certain designated times).

Additionally, the workers have complete and total control over their schedules in that they have absolute, unilateral discretion regarding whether to accept (or not accept) any projects or events offered by Crew One. Consider the following testimonial exchange with Hiram Madge, a stagehand contractor referred by Crew One:

Question: Do you have to accept any Crew One project?

Answer: No, sir. I don't.

Question: Can they make you work any particular project?

Answer: No, sir.

Question: Can you accept or reject as many projects as you want?

Answer: Yes, sir.

Question: Who controls your work schedule?

[9] The only instruction Crew One provides each worker is a start time to show up and check-in with the project coordinator. (V-I, pp. 137-38).

Answer: I do.

Question: Can you turn down Crew One for a more lucrative opportunity if one arose?

Answer: Yes, sir.

Question: Have you, in fact, done that before?

Answer: I believe I have, yes, sir.

Question: Who controls how much or how little you want to work for Crew One?

Answer: That'd be me.

(V-I, pp. 122-23). Again, this factor weighs heavily in favor of independent contractor status, and the Regional Director gave little weight to these arrangements. In Pennsylvania Acad. of the Fine Arts, 343 NLRB 846 (2004), the putative employer was a school that paid models to model for art classes. In holding that the models were independent contractors, the Board stated:

> [e]ach semester, the models alone decide whether to work for the Academy during that semester. If they choose to do so, they exercise complete control over their own schedule; they decide how many classes to accept and what hours to work. Further, the models choose which specific classes they will accept. Thus, they may *choose their schedule according to which professors they prefer, which types of classes they prefer, which class times are convenient for them, or on any other basis they wish.* Some models have chosen to work only 1.5 hours in a semester, while others have chosen to work hundreds of hours in a semester. The models' freedom to control their own schedule with the Academy is *sweeping*.

Id. at 847 (emphasis added).

In the instant case, the workers' freedom to control their own schedule with Crew One is also "sweeping."[10] See also Dial-A-Mattress, 326 NLRB at 891 (finding of independent contractor status because the drivers could "decline orders without penalty"); St. Joseph News-Press, 345 NLRB 474, 478 (2005) (finding it significant in determination of independent

[10] In fact, the workers' ability to set their own schedules is so sweeping that an individual referred to a job is allowed, without repercussion, to swap with another worker or to send a substitute if he or she cannot make it to the event. (V-II, pp. 267-68).

contractor status that the drivers were free "to refuse to deliver to customers they deem unlikely to pay or to whom it would not be economically feasible to deliver"); Young & Rubicam Int'l, Inc., 226 NLRB 1271, 1274-75 (1976) (finding it "evident" that photographers were independent contractors due in part because they were "at liberty to accept or reject a request by the Employer to bid for or perform an assignment," and the employer did not "require any photographer to execute a certain number of assignments for it over a length of time").

Moreover, Crew One does not subject the workers to discipline, establishes no work rules,[11] provides no employee handbook and conducts no training sessions, safety meetings or practice rehearsal activities.[12] (V-I, pp. 39-42; 80, 117-18). Again, these factors weigh in favor of independent contractor status. See, *e.g.*, St. Joseph News-Press, 345 NLRB at 479 ("[C]arriers are neither subject to discipline nor subject to the Respondent's employee handbook or other work rules. Accordingly, this factor weighs in favor of finding independent contractor status."); Dial-A-Mattress, 326 NLRB at 891 (finding it significant in its finding of independent contractor status that the employer did not subject its drivers to its work rules).

b. The workers have potential for entrepreneurial gain (Factor #2).

Many opportunities exist for workers to impact directly how much money they "entrepreneurially" earn by being referred work by Crew One, which weighs in favor of independent contractor status. First, the workers have complete and total control as to whether or not to accept any proposed project or event from Crew One. See, *e.g.*, Pennsylvania Acad.,

[11] Instead, the venue and/or event, in conjunction with requirements set forth by the Occupational and Safety Health Administration ("OSHA"), sets forth its expectations, which are passed along to the workers at the time they are added to Crew One's database. (V-I, pp. 49, 65-66). The Regional Director asserts that the workers are provided with a list of "Employer policies," but he neglects to recognize that these "rules" are merely a pass-through from Crew One's clients. (Decision, 4). Ironically, later in his decision the Regional Director notes that, because Crew One provides workers' compensation insurance "at the behest of clients," that factor leans in favor of contractor status. (Decision, 7).

[12] For those workers required by OSHA to obtain certification for certain rigging or forklift functions, the workers must obtain these certifications at their own expense and on their own time. (V-I, pp. 40-41, 43-44).

343 NLRB at 847 ("[I]n exercising [ ] freedom and choosing how many hours they wish to work for the Academy, the models can control their earnings. The extent to which the models control their own schedules and earnings strongly supports independent contractor status."); Argix Direct, 343 NLRB at 1020 (the entrepreneurial factor supported finding of independent contractor status because the carriers could "elect not to accept routes," and were "not penalized in any manner" for doing so); St. Joseph News-Press, 345 NLRB at 478 (entrepreneurial factor supported finding of independent contractor status as carriers were free to "refuse orders without penalty"). As part of this "sweeping" scheduling flexibility, workers occasionally have the opportunity to accept work at two different events, and the workers have complete discretion to choose the higher-paying event. (V-I, p. 129).[13] Again, the Regional Director placed little emphasis on the fact that the workers are free to set their own schedules as they deem fit.

Second, the workers are free to, and often do, negotiate their pay rate, including both hourly and day rates, as well as a per-event minimum number of hours for which the worker will be paid, regardless of the actual length of time worked.[14] (V-I, pp. 205, 224-28). For example, consider the following testimony from one of the contractors:

> Question: Are there minimum guarantees?
>
> Answer: Most of the time, yes, sir, there's a four-hour minimum.
>
> Question: Explain what that means a little bit, if you would elaborate just a little bit.
>
> Answer: That means that if we finish a call in under four hours, then we still get paid for the whole four hours even if we finish it before the four-hour period.
>
> Question: Does that happen very often?

[13] For example, "corporate" events often are accompanied by a higher pay rate. (V-I, p. 129).

[14] The record establishes that workers receive excess payment for a "mini" for the "vast majority" of events for which Crew One refers labor. (V-I, pp. 168-69).

Answer: Yes, sir. Quite a bit.

…

Question: Well, I mean if you work two hours, how much would you get paid for?

Answer: For four hours.

(V-I, pp. 121-22). See Arizona Republic, 349 NLRB at 1044 (finding that the entrepreneurial factor supported its finding of independent contractor status due in part to the fact that carriers could negotiate a piece rate for deliveries); Lancaster Symphony Orchestra, 357 NLRB No. 152 (2011) (entrepreneurial factor weighed against independent contractor status because the musicians had no authority to negotiate their fees).

Third, the workers are free to hold other jobs, actually engage in that practice and are encouraged by Crew One to do so. (V-I, p. 39). Some of the workers even provide labor for some of Crew One's direct competitors. (V-I, pp. 39, 121).[15] Indeed, the parties stipulated that Crew One's pool of workers overlaps with the Petitioner's pool of workers; that is, a worker who is eligible to be referred by Crew One for one event may be referred by the Petitioner to work another event. (V-II, p. 369). See Arizona Republic at 1043 (entrepreneurial factor supported finding of independent contractor status, as many of the carriers held other jobs).

c. The workers provide their own instrumentalities and tools (Factor #3).

The workers provide all instrumentalities and tools required to perform the necessary work, including: (a) work gloves; (b) a crescent wrench; (c) a hammer; (d) steel-toed work boots; (e) rope; (f) full-body climbing harness; and (g) a hard hat. (V-I, pp. 43, 51-53, 123, 152). Crew One does not provide these items to the workers, nor does it reimburse them for their purchases

[15] For example, one worker who testified at the hearing also works as a plumber. (V-I, pp. 116-17). Other workers, on their database questionnaire, indicated their intent to continue working other jobs, while at the same time performing work for Crew One. (Exh. 13).

for any of these items. (V-I, pp. 123-24). See Pennsylvania Acad., 343 NLRB at 847 ("In an employer-employee relationship, the employer generally supplies the instruments and tools of work. Here, the models supply their own robes and slippers and are sometimes requested to bring costumes. If they prefer to use padding, poles, and other equipment to support their poses, the models supply those items themselves.").

Interestingly, the Regional Director attempts to discount the value attributable to this factor because "although the workers supply their own basic tools, the record reflects that this is common among stagehands and riggers in the industry." (Decision, 8). To the contrary, this assertion actually undercuts the Regional Director's argument, because the standard within the industry is to classify workers as independent contractors required to supply their own instrumentalities and tools. (V-I, pp. 66, 165, 167).

While the Regional Director acknowledges that "the workers supply their own basic tools," he asserts that the "Employer provides reflective vests with the company name printed on them, which the workers are required to wear while at the venue." (Decision, 5). This mischaracterizes the purpose and, in some cases, the provision of such vests. While Crew One does provide a high-resolution vest to the workers, this is a requirement imposed by Crew One's clients, and the vests are provided solely for safety and identification purposes. (V-I, p. 50). Moreover, the industry trend has shifted in that many entertainment acts or producers now provide their own safety vests or color-coordinated t-shirts to the workers to allow them to properly identify workers by department. (V-I, pp. 50, 138-39).

d. The workers will not be hired without the necessary skills (Factor #4).

In the database questionnaire, the workers testify as to certain skill levels in order to be referred to a job by Crew One. (V-I, pp. 39, 193). Following completion of the questionnaire, Crew One then reviews the self-reported qualifications and experience individually with each

worker to determine his or her skill level. (V-I, pp. 47, 193). Additionally, the company keeps certifications on file for those workers with either forklift or rigging certifications. (V-I, pp. 40-41, 43-44, Exh. 6).

Each event requires proper industry knowledge to understand the requirements of the job; in other words, a worker cannot simply show up at an event and perform any of the jobs Crew One refers. For example, the work performed by the riggers to whom Crew One refers work "requires a very specialized skill set."[16] (V-I, p. 213). Crew One also refers work to individuals who have extensive production experience, be it as a head engineer, soundman or other similar proficiency. (V-I, p. 95). Still other workers attend industry-specific classes to obtain the skills necessary to perform certain tasks. (V-I, p. 65).

Even truck loading, presumably the least-skilled craft among the types of work Crew One refers, requires a level of skill and experience well above simply loading a moving truck. (V-I, p. 94). Of course, the Regional Director made no mention whatsoever of this issue in his Decision. See Pennsylvania Acad., 343 NLRB at 847 (independent contractor status granted partially on basis that the employer "offers the models contracts with the expectation that they have the professional modeling skills to perform the job competently"); Lancaster Symphony Orchestra, 357 NLRB No. 152 (2011) (fact that orchestra musicians were "highly skilled" weighed in favor of independent contractor status).

e. Both Crew One and the workers intend to treat their relationship as an independent contractor arrangement (Factors #5, 10, 11).

As previously discussed, the course of dealing between Crew One and the workers demonstrates that both parties intend for the workers to be independent contractors. First, the

[16] One of the skills necessary to perform a rigger's duties includes experience and ability to perform "high steel climbing" to build towers. (V-I, p. 42).

workers voluntarily enter into an explicit Independent Contractor Agreement prior to being referred any work by Crew One. (V-I, p. 63, Exh. 8). Furthermore, testimony from two contractors confirmed that they had always viewed their relationship with Crew One as a contractor relationship, even though the Regional Director, without evidence, asserts otherwise. (V-I, pp. 118-19, 145-46).

Additionally, Crew One provides no employee benefits, reimburses no out-of-pocket expenses such as parking or mileage, and provides no holiday or vacation pay. (V-I, pp. 60, 120-21, 146). While Crew One does maintain workers' compensation insurance, it does so at the insistence of Crew One's clients. Jeff Jackson, Crew One's General Manager, explained it this way:

> The contracts that we have and the clients that we work with all require workers' compensation insurance. For the convenience of the client, it would not be practical for them to try to get 100 certificates of insurance from each individual, so we carry workers' compensation insurance for the simplicity of it for the client. And then it is a pass-along cost that goes on the invoice.

(V-I, pp. 22, 52).[17]

Crew One likewise does not withhold payroll taxes for any of the workers and, in the same vein, provides IRS Form 1099-MISC to the workers at year-end (as opposed to W-2 forms provided to its three full-time employees in its Atlanta office).[18] (V-I, pp. 61-62). In fact, a number of the workers are engaged with Crew One through their individual corporations or limited liability companies, and Crew One pays the entity, rather than the individual, for services

[17] The Regional Director appeared satisfied that this favor did not weigh in favor of classifying the workers as employees.

[18] The Internal Revenue Service ("IRS") has afforded § 530 relief to Crew One regarding the classification of its workers. (Exh. 23). Specifically, § 530 is a safe harbor provision that prevents the IRS from retroactively reclassifying independent contractors as employees, thus allowing Crew One to classify its workers as "non-employees" for purposes of federal classification. Rev. Act of 1978, § 530.

performed by the individual worker. (Exh. 18). Naturally, the Regional Director neglected to mention any of these factors weighing in favor of contractor status.

The Board considers each of these factors as evidence that the parties intend and believe that they are creating an independent contractor relationship. See St. Joseph News-Press, 345 NLRB at 474 (intent "weigh[ed] strongly in favor" of independent contractor status because carriers' contracts specified creation of independent contractor relationships, and because the carriers were not covered by any employee programs); Dial-A-Mattress, 326 NLRB at 884 (contract expressed intent of the parties to create an independent contractor relationship); Argix Direct, 343 NLRB at 1020 (contract expressed parties' intent to create independent contractor relationship); Time Auto Transp., Inc., 338 NLRB 626, 639-40 (2002) (finding independent contractor status and noting that company did not withhold social security taxes, issued 1099 forms to drivers' companies and provided no significant benefits).

f. Crew One's method of payment to the workers weighs in favor of independent contractor status (Factor #6).

Crew One's workers are also referred work on a per-project basis, and no continuing obligation exists on either side of the relationship. (V-I, pp. 62-64).[19] The workers are paid only for the work performed at each event or project, rather than on a salaried or retainer basis, and, contrary to the Regional Director's determination, workers are always free to and do negotiate a different hourly rate, day rate or required minimum number of hours for which he or she will be paid. (V-I, pp. 62-63). See Pennsylvania Acad., 343 NLRB at 847 (finding that the method of payment supported finding of independent contractor status, due in part to the fact that the models were paid on a per-class basis); Capital Parcel Delivery Co., 269 NLRB 52, 54 (1984)

[19] While the workers receive their checks on a weekly basis, they are paid only for work performed for each show. (V-I, p. 62).

(drivers paid on a "per stop" basis held similar to payment on a "by the job" basis, thus resulting in a determination of independent contractor status).

g. The workers have the discretion to work when they choose, and for how long (Factor #7).

Although the Regional Director diminishes this fact, the workers have complete and total control over their schedules in that they have absolute, unilateral discretion regarding whether to accept (or not accept) any projects or events (or parts of projects or events) referred by Crew One. (V-I, pp. 122-23). In fact, when the worker completes his or her database questionnaire, he or she has the freedom to specify which days and/or times of day he or she will consider accepting events or projects. (V-I, p. 95). Consider the following testimony:

> Question: There is also a reference in that same bullet that the independent contractor has the right to set the hours that they wish to work. What do you mean by that?
>
> Answer: It means that they have – when they, you know, are offered work, they have the right to take it, refuse it, choose to only do the load-out, choose to take a – if there are multiple call times, which one they take.

(V-I, pp. 63-64). See Young & Rubicam Int'l, 226 NLRB 1271, 1276-77 n.3 (1976) (finding independent contractor status, partially on basis that freelance photographers "are free to accept or reject assignments"); DIC Animation City, 295 NLRB 989, 991 (1989) (writers' ability to prepare as few or as many scripts as they desire leaned in favor of independent contractor status).

h. The location of the work performed by the workers varies, and is never performed at a Crew One location (Factor #8).

Crew One has one small office location in Atlanta. (V-I, p. 26). That said, none of the work performed by the workers is ever performed at that location; instead, the workers move

from venue to venue as the event or project dictates. (V-I, pp. 110-11, 123).[20] Interestingly, the Regional Director, by directing a mail-ballot election, acknowledges this fact when he notes that "[i]nasmuch as the employees are scattered through the Atlanta metropolitan area and do not regularly report to a location of work under the control of the Employer, a manual election is not feasible in this matter." (Decision, 15). This recognition, however, was never discussed by the Regional Director in his analysis of the independent contractor issue.

Crew One has provided referrals for labor for events at: (i) Aaron's Amphitheatre at Lakewood; (ii) the Verizon Wireless Amphitheater at Encore Park; (iii) Philips Arena; (iv) the Arena at Gwinnett Center; (v) the Georgia Dome; (vi) the Cobb Energy Performing Arts Centre; and (vii) "dozens of other venues." (V-I, p. 110).[21] At any given venue, Crew One has no on-site office, but rather is provided only with a "check-in, check-out" area, which often consists of nothing more than a folding table and chair. (V-I, p. 55). See Carpet Layers, Local 419, 190 NLRB 143, 143-44 (1971) (floor installers held to be independent contractors because they performed no work at the employer's location other than picking up carpet and installation orders).

i. Crew One has no right to assign additional projects to the workers (Factor #9).

On any occasion, the workers have the unilateral right to accept or deny any proposed project or event. (V-I, p. 122). In fact, the workers are encouraged to set forth whatever availability for work they desire, and are able to accept or reject projects for any variety of reasons, including schedule, location and/or availability. (V-I, pp. 38-39, 64, 168). Specifically,

[20] Although workers do come to Crew One's office once for a short orientation (less than 90 minutes), the workers are not paid for that visit, and come merely to understand the expectations set forth by Crew One's clients. (V-I, pp. 47, 193).

[21] Again, while Crew One does have contracts to provide labor referrals to two of these venues, those contracts can be terminated upon 30-days' notice "for any reason." (V-I, pp. 215-16; V-II, p. 275).

Crew One's worker database, which is developed solely from information provided by each worker on his or her database questionnaire, includes the worker's availability (as to both days and time of day) and specific locations where the worker does not wish to be referred work. (V-I, pp. 373-74). As a result, Crew One will exclude certain workers from its inquiry e-mails based upon the worker's specified project or event preferences.

The workers' freedom to set their own schedule is unilateral and indisputable, yet the Regional Director gave little thought to the following arrangement:

> Question: Once you get the e-mail [for a particular event], do you have the discretion whether to accept or reject any particular Crew One event?
>
> Answer: Yes, I do.
>
> …
>
> Question: [D]oes Crew One require you to work any particular event?
>
> Answer: No, sir.
>
> …
>
> Question: Have you turned down Crew One projects before?
>
> Answer: Yes, sir. I have.
>
> Question: Any ramifications, repercussions?
>
> Answer: No, sir. Not at all.
>
> Question: Have you, in fact, done so for extended periods of time?
>
> Answer: Yes, sir. I have taken six months off at a time before to go pursue other interests and things like that, and there's no problem with –
>
> Question: Any ramification?
>
> Answer: No, sir. Not at all.
>
> Question: Were you able to come back and accept projects?
>
> Answer: Came right back to my work in the same capacity as I was before.

…

Question: And did you speak to anyone at Crew One to let them know that you were going to be exploring other interests?

Answer: I'm not – I don't think I did. No, ma'am. I just didn't accept any more calls for six months or so.

(V-I, pp. 125, 138, 140).

Clearly, Crew One's workers may accept (or not accept) any project or event they wish, and Crew One has no authority to assign any additional project to any of its workers.[22] See Young & Rubicam Int'l, 226 NLRB 1271, 1276-77 n.3 (1976) (finding independent contractor status, partially on basis that freelance photographers "are free to accept or reject assignments," even when employer used "a large pool of talented photographers in selecting the best photographer for a certain job"); DIC Animation City, 295 NLRB 989, 991 (1989) (writers' ability to prepare as few or as many scripts as they desired leaned in favor of independent contractor status).

4. The factors referenced herein were largely ignored by the Regional Director, and weigh heavily in favor of a finding that the workers who are referred labor by Crew One are independent contractors.

For the reasons set forth above, the evidence is clear that the workers who are referred labor by Crew One are not employees, but are instead independent contractors. The Regional Director has failed to set forth "more compelling factors" to contradict the wealth of record evidence in Crew One's favor. Specifically:

1. Crew One controls neither the manner nor means by which the workers perform the work. Rather, the event personnel monitor, instruct and control the workers in

[22] Workers are asked simply to respond to the proposed project e-mail inquiry with a "yes" or "no." If a worker consistently and continuously fails to respond to the inquiries, Crew One will then ask whether or not the worker wishes to continue to remain on its referral list. (V-I, pp. 206-08). Crew One does not simply "pull the plug" on the worker's ability to be referred future projects. (V-I, p. 208).

the performance of the work. Crew One does not implement any discipline, establishes no work rules, provides no employee handbook and conducts no training sessions, safety meetings or practice rehearsal activities. Additionally, the workers have complete control over their schedules in that they have unilateral discretion regarding whether to accept (or not accept) any projects or events referred by Crew One.

2. The workers have opportunity for entrepreneurial gain. The workers have the ability to accept as many (or as few) jobs as they wish, may choose a higher-paying alternative, may negotiate their rate of pay and may perform work for other entities (including Local 927).

3. The workers are required to provide their own tools and equipment, and are not reimbursed for purchase or replacement of the same.

4. The work referred by Crew One requires a very specialized skill set. Thus, Crew One refers only those individuals with the requisite skills and certifications necessary to provide qualified labor.

5. Both Crew One and the workers fully intend for their relationship to be one of independent contractor status, and the parties execute a written agreement to that effect. Further, Crew One does not provide any employee benefits, holiday or vacation pay, and it does not reimburse any out-of-pocket expenses incurred by the workers. Crew One withholds no payroll taxes, provides 1099-MISC forms to the workers and even contracts with (and pays) some of the workers through their individual corporations or limited liability companies.

6. The workers are referred work on a per-project basis, with no continuing obligation. The workers are paid only for work performed at each event or project, rather than on a salaried or retainer basis, and they are free to and do negotiate a different hourly rate, day rate or required minimum number of hours.

7. The workers have total control over their schedules, with unilateral discretion to accept (or not accept) any projects or events (or parts of projects or events) referred by Crew One. The worker also has the freedom to specify which days and/or times of day he or she will consider accepting events or projects.

8. None of the work performed by the workers is ever performed at Crew One's single Atlanta office location; instead, the workers travel to a specific venue (at their own expense) as the event or project dictates.

9. The workers have the unilateral right to accept or deny any proposed project or event, are encouraged to set forth whatever availability for work they desire and are able to accept or reject projects for any reason, including schedule, location and/or availability.

Summarily, the workers at issue in this case are independent contractors, and the Regional Director substantially erred, both factually and legally, in his analysis set forth in the Decision. As a result, for the reasons set forth herein, Crew One's Request for Review should be granted.

5. The Regional Director's Decision Completely Ignores the Record Evidence Demonstrating that an Irreconcilable Conflict of Interest Exists between Petitioner and Crew One.

The Petitioner is a direct business competitor of Crew One in the Atlanta labor service market, and it has a financial interest directly adverse to the bargaining unit it now seeks to represent. In such instances, a union is disqualified from acting as a bargaining agent for a unit

of employees if it acts in direct competition with the company whose employees it seeks to represent, or if its financial interests could keep it from devoting complete loyalty to the putative bargaining unit. John E. Higgins, Jr., Nat'l Labor Relations Bd., Office of the Gen. Counsel, An Outline of Law & Proc. in Representation Cases, § 6-350 (2012 ed.). Here, although the record evidence clearly shows that the Petitioner directly competes with Crew One, the Regional Director chose instead to ignore reality.

a. The Regional Director's Analysis Ignores the Arguments Set forth by *Both* Parties.

Without any citation – either to any controlling authority or to the record – the Regional Director asserts the following:

> Initially, I note that it is Local 927, not the Petitioner, that operates a hiring hall. More than a mere affiliation between the Petitioner and Local 927 is necessary to place responsibility of the actions of Local 927 onto the Petitioner. As the Employer has failed to establish that the Petitioner is involved in the operation of the hiring hall or that it controls the operations of Local 927, I find that the Employer has failed to establish the Petitioner, rather than Local 927, may have a potentially disqualifying conflict.

(Decision, 10). To the extent this distinction should be given any weight, a detailed review of the record reveals that the Petitioner never once placed that issue into contention.

More importantly, in its post-hearing brief, the Petitioner focused exclusively on Local 927's operation of its "hiring hall." To that end, the sole basis of the Petitioner's argument is that Local 927's (rather than Petitioner's) operation of a hiring hall should not constitute a disqualifying conflict of interest. Spanning three pages of argument, the Petitioner never hints that Local 927 will not intimately be involved in the negotiation and representation of the workers the Petitioner seeks to represent, and the Petitioner further identifies Local 927 as "its affiliated local union." (Petitioner's Post-Hearing Brief, pp. 14-16). Simply stated, the Petitioner implies (and fails to assert to the contrary) in its brief that it is Local 927 which will

serve as the bargaining entity in any negotiations with Crew One. To the extent this distinction should be given any weight, the record should be reopened to fully examine the relationship between the Petitioner and Local 927.

Moreover, even if the Petitioner and Local 927 are distinct legal entities, the disabling conflict of interest is no less real. The Petitioner derives revenue in the form of per capita tax directly from Local 927 membership. (V-II, p. 351). As a result, the more union members Local 927 enlists, the more revenue the Petitioner ultimately receives. Moreover, even if Local 927 does not participate in labor negotiations, the Petitioner's financial interest in eliminating Crew One as a competitor still remains. If Crew One is eliminated, the individuals to whom it currently refers work will naturally find work through the Petitioner or the Local 927 hiring hall, thus directly benefiting both of those entities.

b. The Regional Director Fails to Properly Apply the Principles Set Forth in *Visiting Nurses*, 254 NLRB 49 (1981).

The Regional Director's decision concludes that the Petitioner does not operate a business in competition with Crew One. Instead, he asserts that:

> [T]he hiring hall only takes in referral fees on a per capita basis and therefore would only receive money when workers are assigned work by the Employer. It therefore is illogical to believe that the Petitioner would advance positions which negatively impact unit employees being assigned work by the Employer.

(Decision, 10). This reasoning falsely assumes that Crew One will agree to an exclusive hiring-hall arrangement with the Petitioner. Therein lies the conflict.

At its core, Crew One has its own referral database upon which it relies. (V-I, p. 25). Similarly, the Petitioner's financial well-being lies in its ability to refer individuals in exchange for a 5% referral fee. (V-II, p. 307). Crew One does not need Local 927's hiring hall to obtain its referrals and, in the same vein, Local 927 does not obtain any referral fee for individuals for whom Crew One refers work.

This situation mirrors the situation the Board addressed in Visiting Nurses, 254 NLRB 49 (1981). In that case, the employer was a licensed home health care agency that provided part-time skilled nursing care (registered nurses and home health aides) to residential homes. Id. at 49. It also sent registered nurses to hospitals to engage in discharge planning for the hospital's patients. Id. at 50. The union operated a registry that directly employed health care practitioners, who it placed as temporary hospital employees. Id. The union also acted as a placement agency for private duty care practitioners who worked in patients' homes. Id. The registry was a direct competitor of this employer operating in the same market. Id.

Private duty practitioners who were members of the union paid the registry a 7% fee from the gross compensation received from the patient. Non-union members, meanwhile, paid 10% of the gross revenues they received. Id. at 50 n.9. On occasion, the nurses of the employer and the registry treated the same patient. Id. at 50. Finally, due to a nursing shortage, the employer and the registry competed in retaining and recruiting nurses.[23] Id. The Board dismissed the petition because the registry was in substantial competition with the employer in that it provided placement services for home nursing services. Id. at 51.

The facts in the instant case are nearly identical. Like the union in Visiting Nurses, the Petitioner operates a union-run referral registry that competes directly with Crew One in providing labor to clients. (V-II, p. 338). More notably, the registry competed with the hospital for the same pool of workers, just as the Petitioner and Crew One compete for the same workers.[24] The parties even stipulated to this fact. (V-II, p. 369).

[23] A competitor of the employer tried to advertise in the union's newsletter but was rejected because it was a competitor with the registry. Id.

[24] The individuals on the Petitioner's registry, like the practitioners on the Visiting Nurses registry, are forced to remit a percentage of their gross compensation directly to the union. Non-union members on the Petitioner's general referral list pay a $50 Referral List Fee, plus 5% of gross compensation earned via any referral. (V-II, pp.

The *only* distinction between the instant case and Visiting Nurses is that the union's referral registry in that case was a for-profit business that received revenue by collecting a percentage of the referrals' gross compensation as a registry fee. Id. at 50. Here, Local 927's survival depends upon revenue from referral fees. Simply stated, without the hiring hall, Local 927 does not exist.

Further, the "hiring hall" distinction was explicitly raised and rejected in St. John's Hospital, 264 NLRB 990 (1992), where the Board concluded:

> [T]he registry is an employment referral service. That it is operated by the [union] does not make it a hiring hall. If [the union] referred nurses only to prospective employers that were signatory to collective bargaining agreements with it, then the registry might well be a hiring hall, which would not pose the conflict we have found. Here, however, there is no such relationship between [the union] and the employers to whom the registry refers nurses.

Id. at 993 n.18. Further, Member Fanning, in his dissent in that case, revisited Visiting Nurses, and articulated the Board's position in that case more clearly:

> Contrary to the majority's claim, the Board did not find in Visiting Nurses [ ] that CNA's operation of its registries constituted the operation of a business. As a close reading of that decision demonstrates, the Board decided there that the CNA registry, which referred nurses to temporary positions in hospitals and homes, was engaging in direct economic competition with the employer, whose business was largely referring nurses to temporary positions in hospitals and homes. The question of whether the CNA registry was a hiring hall was not addressed in the Board's decision. The Board found a disqualifying conflict of interest due to the clear evidence that the registry – regardless of whether it was a hiring hall – was in direct economic competition with the employer.

264 NLRB at 996 n.28. Both Local 927 and Crew One are leading labor providers in the Atlanta market. Visiting Nurses, which the Regional Director failed to address in the Decision in any shape or manner, should be applied to this case. Summarily, as a direct competitor to Crew One,

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307, 322-23). In Visiting Nurses, union members were required to pay 7% of their gross compensation from any referral to the union, while non-union members paid 10% of such compensation.

the Petitioner should be disqualified from representing Crew One's workers due to a disabling conflict of interest.

c. The Regional Director Fails to Appreciate the Competitive Nature of Local 927's Operation of the Hiring Hall.

Both Crew One and the Petitioner provide "labor as a service to clients." (V-II, p. 355). Specifically, Crew One "provides the labor for [entertainment and corporate] events" in the Atlanta metropolitan area, and it further has been stipulated that Crew One is engaged in providing technical labor staffing, including stagehands for various theatrical and industrial venues. (V-I, p. 25). In the same vein, the Petitioner considers itself a "labor provider" in the metropolitan Atlanta entertainment market, and even advertises itself as "Atlanta's leading labor provider with trained and experienced stagehands, A/V technicians and riggers to staff your next event." (V-II, p. 316, Exh. 4).

Crew One and the Petitioner compete for business from the same touring acts and events. The Petitioner explicitly testified that clients needing labor services in the Atlanta market have the following limited options for labor services: (1) the Petitioner; (2) Crew One; (3) Production Arts Workshop; (4) GETT Productions; and (5) All Access. (V-II, pp. 315-16). Crew One and the Petitioner also both seek to obtain "preferred provider" status at various venues in the Atlanta metropolitan area. (V-I, pp. 32-33). For example, both Crew One and the Petitioner (along with Production Arts Workshop, GETT Productions and Rigging Services) are listed as preferred providers for the provision of labor services at both the Arena at Gwinnett Center and the Cobb Energy Performing Arts Centre. (V-I, pp. 32-33).

If a client needs labor for an event, it will request an estimate from Crew One and also obtain either the Petitioner's rate sheet or an estimate directly from the Petitioner. (V-I, p. 26; V-II, p. 317). The touring act or event then compares the estimate or rate sheet from the Petitioner

to the quote(s) provided by Crew One and/or its competitors in order to make a determination regarding with which entity to contract to provide labor for the event. (V-I, p. 26; V-II, pp. 317-18).

Both Crew One and the Petitioner are able to negotiate competitive rates for the labor services provided to prospective touring clients. (V-I, p. 26). The Petitioner, for example, has the ability to, and does, negotiate rates "less than the standard rate" with various clients. (V-II, p. 314). These rates deviate from those listed on its rate sheet, and are varied for the purpose of gaining business. (V-II, pp. 313-15). Clearly, Petitioner directly competes with Crew One to obtain business from the same pool of prospective clients.

Upon initiation of an inquiry from a client needing a specific number of individuals to provide technical labor services for an event, Crew One contacts individuals in its worker database with the requisite skill set necessary to fill the call. (V-I, p. 58). In an identical manner, the Petitioner will field an inquiry from a client requesting a specific number of individuals to provide labor services for an event. (V-II, p. 318). The Petitioner will then contact individuals on its general referral list who have the proper skill level to fill the call.[25] (V-II, p. 318). Regardless of which entity (Crew One or the Petitioner) refers the work, the workers provide the same services to the clients.

The individuals to whom Crew One refers work are free to be referred and are referred work by other labor providers, including the Petitioner. (V-I, p. 39). Similarly, the individuals to whom the Petitioner refers work are not prohibited from providing labor for non-union labor providers. (V-II, p. 316). Like Crew One, the Petitioner maintains a pool of workers composed both of union and non-union workers. (V-II, pp. 39, 307). The parties stipulated that an

[25] The manner in which the Petitioner operates the hiring hall, with the exception of how the referrals are paid and rotated on the respective labor providers' call lists, is virtually identical to Crew One's business model. (V-II, pp. 338-39).

"overlap" exists in the pool of workers referred by Crew One and the Petitioner; that is, workers maintain status both on Crew One's and the Petitioner's referral lists. (V-II, p. 369). The skills possessed by the workers in the respective pools, both for the Petitioner and for Crew One, are compiled substantially in the same manner, either via Crew One's database questionnaire or the Petitioner's referral applicant orientation package. (V-I, p. 38; V-II, pp. 321-22).

If the Petitioner is allowed to represent the Crew One workers, it could immediately make unreasonable demands on Crew One to which Crew One could not agree. If after making such demands and being rebuffed, the Petitioner were to commence a strike, the work that Crew One was performing for its clients would have to be performed by other competitors in the Atlanta market, including the Petitioner.

Similarly, as a competitor to Crew One and representative of the Crew One workers, the Petitioner could force Crew One to bargain for higher pay rates, which would force Crew One either to reduce the amount of money it earns through referring a worker or to increase the amount it charges to its clients. If Crew One is forced to increase the amount it charges to clients, then clients will naturally seek other referral sources, including the Petitioner. Stated differently, the Petitioner's labor cost estimate provided to prospective clients would become more attractive. This direct competitive benefit to the Petitioner will create a conflict in representing the Crew One workers.

d. The Regional Director Fails to Appreciate the Financial Interest the Petitioner Has in Competing Against Crew One, which Could Prevent it from Devoting Complete Loyalty to Crew One's Workers.

Not only does the Petitioner compete directly with Crew One, but it also has a financial interest that could keep it from devoting complete loyalty to the proposed bargaining unit. John E. Higgins, Jr., Nat'l Labor Relations Bd., Office of the Gen. Counsel, An Outline of Law & Proc. in Representation Cases, § 6-350 (2012 ed). When the Petitioner refers workers to its

clients, it receives 5% of the gross compensation paid to those workers. (V-II, p. 307). If the Petitioner is able to take work away from Crew One (and, consequently, from the workers in the proposed bargaining unit), it will be able to increase the gross referral fees it receives from those workers it refers. No doubt the Petitioner will be inclined to send work where it can collect 5% of the gross compensation earned. In such instances, the workers the Petitioner is seeking to organize would be the ones most harmed by such an attempt.

The non-union workers obtain their place on the Petitioner's list by paying an annual $50 fee. (V-II, p. 322). If the Petitioner has difficulty filling a call from its general referral list, it can and does go out and find other individuals to fill the call, and those individuals are not required to pay the annual referral fee. (V-II, p. 323). The effect is that the Petitioner may fill any given call with union members, non-union members (who pay the annual fee) and other workers who pay no annual fee to the Petitioner. In many cases, these are the same individuals Crew One uses to fill its calls. (V-I, p. 39).

Moreover, all workers to whom the Petitioner refers labor pay 5% of gross wages earned to the Petitioner for each event worked. (V-II, p. 307). Clearly the Petitioner has an incentive to refer work to as many individuals as possible, irrespective of their affiliation with the Petitioner. Likewise, Crew One intentionally maintains a broad referral list for purposes of referring as many workers as possible to its clients. (V-I, pp. 177, 194, 219, Exh. 21). Ultimately, Crew One and the Petitioner compete for the same available pool of workers.

The Petitioner's LM-3 shows total receipts of $187,426. Reducing this figure by the annual dues ($33,600) and the annual referral fee ($7,370), the remaining balance is $146,456, which was generated by the 5% fee on gross wages paid to workers. It is clear that a vast majority of the Petitioner's revenue comes from the 5% fee charged on wages, which is only

generated if the Petitioner is able to garner referrals for its workers. The Petitioner can only accomplish that by competing with the other providers in the marketplace (including Crew One). Succinctly, this constitutes direct competition.

The conflict thus exists because the Petitioner must have the 5% fee, which represents 78% of its revenue, to survive. If the Petitioner can generate more from the 5% fee, it can pay higher wages to its employees, expand its operations, increase its advertising budget, etc. See Visiting Nurses, 254 NLRB at 50 ("[B]ased on a comparison of either the net revenue … or of the total business, in dollar terms, generated by the private placement service …, the Registry's home placement service is *not a minimal part* of the Registry's business.") (emphasis added).

e. The Regional Director Ignored Well-Established Board Precedent Preventing Entities Similarly-Situated to the Petitioner from Competing in a Situation that Creates a Disabling Conflict of Interest.

In addition to Visiting Nurses, *supra*, the Board has addressed other cases involving similar disabling conflicts of interest. Specifically, the Board has negated multiple instances in which a union has attempted to unionize a business competitor.

First, in Bausch & Lomb Optical Co., 108 NLRB 1555 (1954), the company was engaged in the manufacture and sale of eyeglasses. Id. at 1564. The union had represented the company's employees for a number of years and the relationship was "harmonious." Id. at 1558. In 1953, the union formed a business in direct competition with Bausch & Lomb, as well as all other optical wholesalers in the area. Id. Bausch & Lomb refused to bargain with the union until it divorced itself from the competing business. Id. at 1558-59. Thereafter, the employees struck, and a charge was filed for refusing to bargain. Id. at 1559.

The NLRB, however, held that Bausch & Lomb committed no violation, noting that "[w]here a union has a dual status of a bargaining agent and business competitor, it is not a

proper representative of respondent's employees." Id. at 1562. The Board further found a conflict of interest because the union owed complete loyalty to the employees it represented:

> As the Supreme Court has stated: 'The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.' … In our opinion, the Union's position as (sic) the bargaining table as a representative of the Respondent's employees while at the same time enjoying the status of a business competitor renders almost impossible the operation of the collective-bargaining process. For, the Union has acquired a special interest which may well be at odds with what should be its sole concern – that of representing the interests of the Respondent's employees. In our opinion, the situation created by the Union's dual status is fraught with potential dangers.

Id. at 1559 (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)).

In the same manner, the Petitioner's position at the bargaining table with respect to Crew One's workers, while also operating as a direct competitor, would allow it to obtain a special interest at odds with its sole concern, that of complete loyalty in representing the interests and well-being of Crew One's workers. The Board should not allow such a situation "fraught with potential danger" to exist.

The union was also disqualified from representation due to a conflict of interest in St. John's Hospital, 264 NLRB 990 (1982). In that case, the union operated a registry to refer nurses. Id. at 991. The employer was a hospital that employed nurses. Id. at 990. In determining that a conflict existed, the Board stated:

> The potential types of conflicts of interest are virtually unlimited where a labor organization's financial interests are distinct from its interests as a collective bargaining representative, and, therefore, as long as CNA maintains an interest in its registry business that conflicts with its collective bargaining responsibilities, it will be disqualified from representing the employer's employees …. Accordingly, since we have found that CNA has interests outside its bargaining capacity, we shall dismiss the petition herein.

Id. at 993.

In the instant case, the Petitioner's representation of the Crew One workers would likewise create the potential for "virtually unlimited" conflicts of interest (a conflicting financial

interest, for example) in opposition to its bargaining obligations and duty of complete loyalty to those workers.

The Regional Director, however, in ruling that no disqualifying conflict exists, tried to distinguish St. John's Hospital, as follows:

> The Board [ ] noted in that case if the union referred nurses only to prospective employers who were signatory to collective bargaining agreements with the union, then the registry may qualify as a hiring hall and would therefore not pose a conflict as found in that case.

(Decision, 11). This assertion might be true if Local 927 had established majority status to an employer to whom it refers clients. In reality, however, Crew One and Local 927 compete for "run-of-the-show contracts." (Exh. 31). Contrary to the Regional Director's assertion to the contrary, the Petitioner in the instant case does not have a collective bargaining agreement with its run-of-the-show clients. (V-II, pp. 294-96, 298). These short-term, show-length contracts contain no recognition clause, terminate upon completion of the event or show and are analogous to Crew One's event-specific contracts. (Exh. 10).[26] As a result, the Petitioner's attempt to distinguish Crew One from itself by indicating that it is a hiring hall "is a distinction without meaning." St. John's Hosp., 264 NLRB at 992 (referring to the union's argument that the conflict-of-interest doctrine is limited to factual situations where the employer and the union are in the same business).

[26] The Petitioner does have a multi-year contract with the Fox Theater, where it employs five represented employees in full-time positions. (V-II, p. 297, Exh. 26). It also has a multi-year contract with the Atlanta Ballet and the Atlanta Opera. (V-II, pp. 297-98, Exh. 27-28). The Petitioner has no contracts with labor providers. (V-II, p. 313). If the Fox Theater, Atlanta Ballet or Atlanta Opera (rather than Crew One) were making the argument that a conflict of interest exists based upon the Petitioner operating a hiring hall, the Petitioner's argument might have merit, as none of those organizations are in the business of referring labor. The Petitioner, however, is in direct competition with Crew One for the right to refer workers to various events or projects.

f. The Petitioner's Hiring Hall Constitutes an Illegal Pre-Hire Agreement.

Again, Crew One and Local 927 compete in the "one-off" arena, whereby labor is provided on a per-show basis. (V-II, pp. 303-04). The Regional Director incorrectly avers that "the Local 927 hiring hall refers individuals only after there is a signed collective bargaining agreement with that production or venue." (Decision, 11). This statement blatantly misrepresents the record evidence. Local 927 has no collective bargaining relationship with the producers or acts needing labor. (V-II, p. 333). Instead, a "one-off" contract sets out the rates and benefits to be paid to the individuals for whom Local 927 refers labor, which is completed before any producer or event hires any union workers. (V-II, pp. 317-18). The Petitioner then refers labor to the producer. (V-II, p. 318). No evidence exists in the record that the Petitioner ever engages in *any* sort of bargaining in such instances.

A pre-hire agreement of this sort is lawful only in the construction industry. 29 U.S.C. § 158(f). Such an agreement created with a union outside the construction industry violates 29 U.S.C. § 158(a)(2). See International Ladies' Garment Workers' Union v. N.L.R.B., 366 U.S. 731, 737 (1961) (agreement held invalid when obtained under "erroneous claim of majority representation."). In the instant case, such "one-off" contracts are signed prior to hiring any union labor.

Moreover, the producers, which are engaged primarily in the business of staging shows and concerts, are not in the construction industry and, therefore, cannot lawfully execute pre-hire agreements. See The Expo Grp., 327 NLRB 413, 428-29 (1999) (emphasis added):

> Respondent is not engaged *primarily* in the building and construction industry. Certainly, its employees perform considerable construction, but this work is incidental to its mission of producing trade shows, *in the same sense that constructing sets or even complete buildings for use in a motion picture would be incidental to the basic mission of producing the film.*

> If a trade show or movie producer hired a construction contractor to erect a structure, this building activity might well be primary to the mission of the contractor, but it would remain secondary to the mission of the producer. Even assuming for the sake of analysis that the work of assembling displays and exhibits constitutes activity in the construction industry, I find that the Respondent is only *secondarily*, and not primarily, engaged in that industry.

The one-off contracts executed by the Petitioner constitute illegal pre-hire agreements, and are used by the Petitioner to compel a show producer to use its referrals at the quoted fees. Such contracts are *not* collective bargaining agreements, and the Regional Director's assertion to the contrary is simply incorrect.

IV. CONCLUSION

For the foregoing reasons, Crew One submits that the Regional Director's Decision is replete with factual and legal errors, omissions and misrepresentations. First, the Regional Director's determination that the workers in question are independent contractors is clearly erroneous on the record, which prejudicially affects Crew One's rights. Second, the Regional Director's assertion that no disabling conflict of interest exists not only departs from well-established Board precedent, but also ignores the factual issues in play in this case. As a result, Crew One's Request for Review should be granted.

Respectfully submitted,

MILLER & MARTIN PLLC

By: s/ J. Y. Elliott, III
William G. Trumpeter, TN Bar No. 9301
W. Randall Wilson, TN BPR No. 9852
J. Y. Elliott, III, TN BPR No. 17344
Scott E. Simmons, TN BPR No. 29392

1000 Volunteer Building
832 Georgia Avenue
Chattanooga, TN 37402
Telephone: (423) 756-6600
Facsimile: (423) 785-8480

Attorneys for the Employer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed electronically with the NLRB. A copy of this filing has been sent via electronic mail to the following:

National Labor Relations Board
Executive Secretary
1099 14th Street, NW
Washington, D.C. 20570
(Electronically Filed)

Mr. Claude T. Harrell, Jr.
Regional Director
National Labor Relations Board, Region 10
233 Peachtree Street, NE
Harris Tower, Suite 1000
Atlanta, GA 30303
(Via Electronic Mail)

Mr. Daniel DiTolla
International Alliance of Theatrical Stage Employees
207 W. 25th Street, 4th Floor
New York, NY 10001
(Via Electronic Mail)

Robert M. Weaver, Esq.
Tessa Warren, Esq.
Quinn, Connor, Weaver, Davies & Rouco LLP
3516 Covington Highway
Decatur, GA 30032
(Via Electronic Mail)

This 7th day of May, 2014.

By: s/ J. Y. Elliott, III

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CREW ONE PRODUCTIONS, INC.

Employer,

and **Case 10-RC-124620**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

Petitioner.

UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION REGARDING APPROPRIATE ELIGIBILITY FORMULA

I. INTRODUCTION

The Petitioner, International Alliance of Theatrical Stage Employees ("IATSE" or "Union"), pursuant to §102.67 of the Board's Rules and Regulations submits this Request for Review of the Decision and Direction of Election issued by the Regional Director of Region 10 on April 23, 2014 ("DDE"). This Request for Review is solely limited to the Regional Director's determination of the appropriate voter eligibility formula contained in Section of 3 of the DDE. (DDE, pp. 11-14). The Union does not Request Review of any other portion of the DDE.

II. GROUNDS FOR SEEKING REVIEW OF THE REGIONAL DIRECTOR'S DDE

Pursuant to §102.67(c) of the Board's Rules and Regulations, a Request for Review of a Regional Director's Decision in a representation case may be granted, *inter alia*, upon the following grounds:

(1) That a substantial question of law or policy is raised

> because of (i) the absence of, or (ii) departure from, officially reported Board precedent.

The Board should grant review here because the Regional Director has failed to apply and departed from official Board precedent in determining the eligibility formula in this case. As we show below, there are compelling reasons to grant the request for review.

III. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR BY FAILING TO APPLY AND DEPARTING FROM ESTABLISHED BOARD PRECEDENT

This case involves a petition by the Union to represent a unit of "stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events in the Atlanta metropolitan area"[1] employed by the employer, Crew One Productions, Inc. ("Crew One" or "employer"). (DDE, pp. 1-2). Crew One, an entertainment industry employer, employs stagehands "for various theatrical and industrial venues" in the Atlanta metropolitan area. Approximately eighty (80) percent of the events for which Crew One employs stagehands are concerts, plays and sporting events. (DDE, p. 3). In 2013, the employer provided stagehands for approximately 220 events with about 185 of those events, or eighty-five (85) percent being at larger venues. (DDE, p. 12). Crew One staffs events on a year round, and not on a seasonal basis "at dozens of venues throughout the Atlanta metropolitan area.". (DDE, pp. 3-4).

The Board's decision in *Davison-Paxon Co.*, 185 NLRB 21 (1970) provides the "Board's

[1]The petitioned for unit is collectively referred to as "stagehands" in the Request for Review unless otherwise noted.

longstanding and most widely used formula to determine voter eligibility for part-time or on-call employees." *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 524 (2007) (citing *Davison-Paxson, supra*). Under the *Davison-Paxson* formula "an employee is considered to have a sufficient community of interest with unit employees if that employee regularly averages 4 or more hours of work per week for the last quarter prior to the election eligibility date." *Id*. at 524 (citing *Davison-Paxson*, 185 NLRB at 23-24 and *Steppenwolf Theatre*, 342 NLRB 69,71 (2004)). "The Board has made clear that the *Davison-Paxson* formula should be followed absent a showing of special circumstances." *Id.* Furthermore, the "Board in recent years . . . has consistently applied the standard Davison-Paxson formula to entertainment industry employers that **operate on a year-round basis**." *Id.* (Emphasis supplied).

In this case, the Regional Director in his DDE did not even bother to mention the *Davison-Paxson* formula, let alone apply it to the facts of this case or determine whether special circumstances existed warranted departure from its application. Rather, the Regional Director relied on the Board's unpublished decision in *Clear Channel d/b/a Oak Mountain Amphitheatre*, 10-RC-15344 (2002) to justify his departure from the Board's admonition to use the *Davison-Paxson* formula absent a showing of special circumstances.

In *Clear Channel*, the employer operated on a seasonal basis between the end of March and mid-October, promoting about twenty-five (25) concerts or other events at the Oak Mountain Amphitheatre in Pelham, Alabama. The employer's proposed eligibility formula would have permitted employees with as little as eight (8) hours of work in an entire year in the unit while the petitioner's proposed formula would exclude some employees who worked 7 or 8 events with well over 100 hours of work in the preceding year from the unit. Finding that neither proposed formula

permitted "optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer", the Regional Director devised a formula based on the Board's decision in *Medion, Inc.*, 200 NLRB 1013 (1972). (*Clear Channel*, DDE p. 6, citing *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992)). In *Medion*, the Board found eligible all employees who were employed by the employer on at least two productions for a minimum of five working days during the year preceding the Decision and Direction of Election. On Review, the Board's unpublished decision in *Clear Channel* adopted a formula based on *American Zoetrope Productions*, 207 NLRB 621 (1973) and held that the *American Zoetrope* standard of two shows in the year preceding the issuance of the DDE was the appropriate formula to be applied.

In reliance on the unpublished Board decision in *Clear Channel*, the Regional Director in this case eliminated the hours of work requirement and instead based eligibility solely on the number of days "assigned to those on the referral list." (DDE, p. 13). He went even further and modified the formula to include "at least two events or five work days, **regardless of the length of those days**, during the year preceding issuance" of the DDE. (DDE, pp. 13-14) (Emphasis supplied).[2]

Critically, the DDE in this case departs from Board precedent in a number of ways. First,

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[2]The Union at the hearing in this case advocated for an "upward" departure of the formula proposed by the Regional Director in *Clear Channel* that would take into account hours worked during the year preceding the DDE as opposed to only days assigned to those on the referral list. In essence, the Union's proposed eligibility formula was a modified *Davison-Paxson* formula taking into account the year round nature of Crew One's operations and hours worked by the employees. The Union's attempt here was to be as inclusive as possible "without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal*, 306 NLRB at 296. The Regional Director, on the other hand, without consideration of *Davison-Paxson*, created a formula that went even further than the one found to be appropriate in *Clear Channel*.

the DDE failed to take into account that Crew One is a year round employer. Second, the DDE failed to apply the *Davison-Paxson* formula as required by officially reported Board precedent for entertainment industry employers who operate on a year round basis. Third, the DDE failed to determine and establish that special circumstances existed to depart from the *Davison-Paxson* formula. Fourth, the DDE relied on an unpublished Board decision to fashion the formula in this case. Finally, by eliminating the hours of work requirement proposed by the Union and upon which the *Davison-Paxson* formula is based, the DDE would permit stagehands who worked as little as five (5) hours in the year preceding the issuance of the DDE to vote in the election.[3] In other words, a stagehand who worked two events or five days but only worked one hour on each of those days would be eligible to vote in the election. Accordingly, the DDE in this case by failing to consider and apply the *Davison-Paxson* formula and application of "special circumstances" --without identifying what those circumstances are and by eliminating the hours of work requirement-- created an eligibility formula that is "'overly inclusive, including those with only the most peripheral interest in the [e]mployer's terms and conditions of employment.'" *Columbus Symphony*, 350 NLRB at 525 (citing *Steppenwolf Theatre*, 342 NLRB at 72)).

It is undisputed that Crew One operates on a year round basis. According to the record in this case, there were 544 individuals who worked at least one day for the employer between March 17, 2013 and March 17, 2014. (DDE, p. 12). On the other hand, the employer in *Clear Channel*, operated the Oak Mountain Amphitheatre on a seasonal basis from March to October. The Regional

[3]Even assuming that a stagehand worked a 4 hour shift which is typical in the industry, by eliminating the hours of work requirement as expressed in *Davison-Paxson*, a stagehand would be eligible to vote having only worked 5 work days for a total of 20 hours in the year preceding the DDE. (See, *e.g.*, DDE, p. 12, "riggers complete their tasks within four hours at a typical event".).

Director in this case, instead of applying the *Davison-Paxson* formula to Crew One's year round operation, applied instead a formula used for a seasonal operation and then eliminated any hour of work requirement holding that "days assigned to those on the referral list rather than hours worked is the most significant indication of future employment with the Employer." (DDE, p. 13). The Regional Director, however, provided no factual basis to conclude that "days assigned" rather than "hours worked" was a more significant consideration in fashioning an appropriate eligibility formula in this case. At bottom, the eligibility formula arrived at by the Regional Director in this case results in the enfranchisement of many individuals who work very infrequently or drop off the list altogether and have "'only the most peripheral interest in the [e]mployer's terms and conditions of employment.'". *Columbus Symphony*, 350 NLRB at 525 (citing *Steppenwolf Theatre*, 342 NLRB at 72).

IV. CONCLUSION

For the reasons set forth above, the Union respectfully requests that is Request for Review be granted, that the Regional Director's eligibility formula be reversed and the Regional Director be instructed to apply the Board's *Davison-Paxson* formula to this case to determine those eligible to vote in the election.

Respectfully submitted,

/s/George N. Davies
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Robert M. Weaver

/s/Tessa A. Warren
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Counsel for Petitioner, International Alliance of Theatrical Stage Employees

Date: May 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Request for Review was filed electronically with the National Labor Relations Board and served by U.S. Mail to:

Claude T. Harrell, Jr., Regional Director
Region 10
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, N.E.
Atlanta, GA 30303-1513

and

J. Y. Elliott, III, Esq.
W. Randall Wilson, Esq.
Scott E. Simmons, Esq.
William G. Trumpeter
Miller & Martin PLLC
1000 Volunteer Building
832 Georgia Avenue
Chattanooga, TN 37402-2289

On this the 7th day of May, 2014.

/s/George N. Davies
George N. Davies

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CREW ONE PRODUCTIONS, INC.
Employer

and

Case 10-RC-124620

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
Petitioner

ORDER

The Employer's and Petitioner's Requests for Review of the Regional Director's Decision and Direction of Election are denied as they raise no substantial issues warranting review.[1]

MARK GASTON PEARCE,	CHAIRMAN
PHILIP A. MISCIMARRA,	MEMBER
NANCY SCHIFFER,	MEMBER

Dated, Washington, D.C., August 21, 2014

[1] Contrary to our colleague's suggestion, the Regional Director examined both the factors that support and those that detract from independent contractor status. In addition, the Regional Director did evaluate the significance of independent contractor agreements signed by the stagehands. He simply found that their potential significance was undercut by the fact that they apparently were mandated by the Employer.

Unlike his colleagues, Member Miscimarra believes the Regional Director and Crew One have identified substantial questions that warrant granting review on whether stagehands are independent contractors or employees of Crew One. As to this issue, Member Miscimarra notes that the Regional Director determined certain factors favor independent contractor status; regarding certain other factors, the role of Crew One appears to be extremely limited given that most if not all performed work is directed and controlled by third party client(s); and Member Miscimarra believes the Board should determine what weight, if any, shall be afforded to written agreements stating that stagehands would work as independent contractors. Even though such agreements are not necessarily dispositive, it appears that they were afforded no weight in this case, although the Regional Director recognized that a material issue when evaluating employee status is whether, among other things, parties believed they were creating an employee or independent contractor relationship.

FORM NLRB-760
(7-10)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed
MARCH 17, 2014

CREW ONE PRODUCTIONS, INC.

Employer

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

Petitioner

Case No. 10-RC-124620

Date Issued 08/27/2014

City ATLANTA State GA

Type of Election: *(Check one:)*

- ☐ Stipulation
- ☒ Board Direction
- ☐ Consent Agreement
- ☐ RD Direction
  Incumbent Union (Code)

(If applicable check either or both:)

- ☐ 8(b) (7)
- ☒ Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters — 408
2. Number of Void ballots — 26
3. Number of Votes cast for INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES — 116
4. Number of Votes cast for —
5. Number of Votes cast for —
6. Number of Votes cast against participating labor organization(s) — 60
7. Number of Valid votes counted (sum 3, 4, 5, and 6) — 176
8. Number of challenged ballots — 16
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) — 192
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

For the Regional Director

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Employer

For Union

For

Exhibit 7

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CREW ONE PRODUCTIONS, INC.

Employer

and **Case 10-RC-124620**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

Petitioner

TYPE OF ELECTION: BOARD DIRECTION

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

Unit: All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

September 4, 2014

NANCY WILSON
Acting Regional Director, Region 10
National Labor Relations Board

Exhibit 8

cc: Tessa Warren, Attorney
Quinn Connor Weaver Davies &
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3516 Covington Highway
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W. Randall Wilson, ESQ.
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Daniel Ditolla, 8th International
Vice President/Co-Department
Director Stagecraft
International Alliance of
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Scott E. Simmons, ESQ.
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Chattanooga, TN 37402-2263

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,[1] an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

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1 Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

QUINN, CONNOR, WEAVER,
DAVIES & ROUCO LLP

ROBERT M. WEAVER
E-MAIL: RWEAVER@QCWDR.COM
REPLY TO ATLANTA OFFICE

September 8, 2014

Mr. Jeff Jackson
Crew One Productions, Inc.
Suite E, 763 Trabert Avenue, NW
Atlanta, GA 30318-4245

Re: IATSE-Crew One Negotiations

Dear Mr. Jackson:

On behalf of IATSE, this is to request that you or your counsel contact me to arrange dates for the parties to commence bargaining for an initial collective bargaining agreement. IATSE proposes that we schedule a series of bargaining sessions to be held in Atlanta beginning on or after October 15, 2014.

IATSE also hereby requests that Crew One provide the following information (below). This information is sought by IATSE for representation of the Crew One bargaining unit in the forthcoming negotiations for a collective bargaining agreement. Please provide the information as it is or becomes available to Crew One, but none of it later than October 10, 2014 so that we may prepare for the upcoming negotiations.

1. The name and current address, e-mail address and telephone contact information for each person employed in the Crew One bargaining unit during the period of January 1, 2012 to date.

2. For each person identified in response to Request No. 1, identify 1) the hours worked in each year; 2) a list of the shows, productions or other events worked and date(s) thereof; 3) the job, job classification, position or duties to which was assigned; and 4) amounts paid for each show, production or other event.

3. For each show, production or other event identified in response to Request No. 2, provide a copy of the contract, agreement or other document (e.g., letter or e-mail) between Crew One and the person, company, production company, venue or other entity with which Crew One contracted for the provision of labor and services for said show, production or event.

Exhibit 9(a)

4. For each show, production or other event identified in response to Request No. 2, provide a copy of the "settlement sheet" or other document reflecting amount paid to Crew One by the person, company, production company, venue or other entity with which Crew One contracted for the provision of labor and services for said show, production or event.

5. Provide a copy of any "standing" contracts or agreements between Crew One and any person, company, production company, venue or other entity for the regular or long-term provision of labor and services by Crew One. If agreement or arrangement to provide such services is not reduced to writing provide the terms and conditions of said agreement or arrangement.

6. For the period of January 1, 2012 to date, identify all persons employed in the Crew One bargaining unit that Crew One management discharged or did not subsequently re-hire, and the reason(s) therefor.

7. Identify all persons employed by Crew One as Production Coordinators during the period of January 1, 2012 to date.

8. Provide a copy of all handbooks, manuals or other such documents reflecting all terms and conditions of employment, rules, policies or procedures in effect for Crew One employees in effect during the period of January 1, 2012 to date. If said information is not provided to employees in writing, provide a complete description of same.

9. Provide copies of the current summary plan descriptions for medical, dental, vision, accidental death & dismemberment or other welfare benefit plan or policy in effect for any Crew One employee during the period of January 1, 2012 to date.

10. Identify all persons participating in any plan or policy identified in response to Request No. 9, including but not limited to information identifying the type and/or level of coverage in effect for each.

11. Provide information reflecting Crew One's medical, dental, vision, accidental death & dismemberment or other welfare benefit plan or policy claims experience during the period of January 1, 2012 to date, including but not limited to total numbers and amounts of claims submitted; total number and amounts of claims denied; and total numbers and amounts of claims paid. By this request IATSE is not seeking any personally identifying information or medical information, and same may be redacted by IATSE in any response provided.

12. Identify premiums paid by Crew One for its medical, dental, vision, accidental death & dismemberment or other welfare benefit plan or policy during the period of January 1, 2012 to date.

13. Provide a copy of any Worker's Compensation policy covering employees of Crew One during the period of January 1, 2012 to date.

14. Provide a copy of any information provided to Crew One employees regarding Worker's Compensation coverage and claims procedures during the period of January 1, 2012 to date.

15. Provide information reflecting Crew One's Worker's Compensation claims experience during the period of January 1, 2012 to date, including but not limited to total numbers of claims and amounts of claims submitted; total numbers and amounts of claims denied; and total numbers and amounts of claims paid.

16. Identify premiums paid by Crew One for Worker's Compensation coverage, or amounts paid to third parties to obtain for Worker's Compensation coverage, during the period of January 1, 2012 to date.

17. Provide a copy of any drug and alcohol or other substance abuse policy in effect for Crew One employees during the period of January 1, 2012 to date.

18. Identify by date and location the occasion(s) on which any Crew One employees was subjected to a drug or alcohol test under Crew One's policy (including the number of employees tested on each such occasion); describe the results by employee; and describe any resulting communication or correspondence (including but not limited to discipline issued) following testing.

19. For calendar or fiscal years 2011, 2012 and 2013, provide any audit, financial statement, profit and loss statement or other such document or report reflecting the income and expenses of Crew One.

20. For calendar or fiscal years 2011, 2012 and 2013, provide any audit, financial statement, profit and loss statement or other such document or report reflecting the income and expenses of any entity providing funds or revenue for the operations of Crew One.

Sincerely,

Robert M. Weaver

RMW/r
cc: Dan DiTolla, International VP, IATSE
Jay Elliott, Esq.

From: Robert Weaver
To: "jelliott@millermartin.com"
Subject: Crew One
Date: Monday, September 22, 2014 9:19:00 AM
Attachments: image001.png

Jay, following up on the bargaining demand and information request. Please let me know Crew One's position.

Thanks

Robert M. Weaver

Quinn, Connor, Weaver, Davies & Rouco LLP
3516 Covington Highway
Decatur, GA 30032
205/870-9989

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From: Robert Weaver
To: "Jay Elliott"
Subject: RE: Crew One
Date: Tuesday, September 23, 2014 4:08:00 PM
Attachments: image001.png

Jay, thanks for the response. We will proceed accordingly.

Robert M. Weaver

Quinn, Connor, Weaver, Davies & Rouco LLP
3516 Covington Highway
Decatur, GA 30032
205/870-9989

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From: Jay Elliott [mailto:jelliott@millermartin.com]
Sent: Tuesday, September 23, 2014 4:03 PM
To: Robert Weaver
Subject: RE: Crew One

Bob – In response to your letter to Jeff Jackson and your email to me, please be advised that Crew One strongly believes the NLRB's decisions (i) that the independent contractors referred by Crew One are employees is wrong, and (ii) that no conflict of interest exists is wrong. Therefore, Crew One will refuse to bargain in order to obtain a review of the NLRB's decisions in an appropriate U.S. Circuit Court of Appeals.

J.Y. Elliott III
Miller & Martin PLLC

Suite 1000 Volunteer Bldg.
832 Georgia Avenue
Chattanooga, TN 37402
Phone (423) 785-8361

Fax (423) 321-1522

CONFIDENTIALITY NOTICE
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Please also advise us immediately if you or your employer does not consent to receipt of Internet e-mail for confidential messages of this kind.

From: Robert Weaver [mailto:rweaver@qcwdr.com]
Sent: Monday, September 22, 2014 9:19 AM
To: Jay Elliott
Subject: Crew One

Jay, following up on the bargaining demand and information request. Please let me know Crew One's position.

Thanks

Robert M. Weaver

Quinn, Connor, Weaver, Davies & Rouco LLP
3516 Covington Highway
Decatur, GA 30032
205/870-9989

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FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
10-CA-138169	10-3-14

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Crew One

b. Tel. No. 404/350-3541

c. Cell No.

f. Fax No. 404/350-3546

d. Address (Street, city, state, and ZIP code)
763 Trabert Avenue, NW
Suite E
Atlanta, GA 30318

e. Employer Representative
Todd Hardison

g. e-Mail
thardison@crew1.com

h. Number of workers employed
250

i. Type of Establishment (factory, mine, wholesaler, etc.)
Theatrical & Stage Production Company

j. Identify principal product or service
Stage Hands and Riggers

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
Since on or about September 23, 2014 the above-named employer has refused to bargain with the certified bargaining representative of its bargaining unit employees (see Case No. 10-RC-124620).

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
International Alliance of Theatrical Stage Employees

4a. Address (Street and number, city, state, and ZIP code)
207 West 25th Street
4th Floor
New York, New York 10001

4b. Tel. No. 212/730-1770

4c. Cell No.

4d. Fax No. 212/730-7809

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By (signature of representative or person making charge) Robert M. Weaver, Attorney (Print type name and title or office, if any)

Address 3516 Covington Highway, Decatur, GA 30032

9/24/14 (date)

Tel. No. 404/299-1211

Office, if any, Cell No.

Fax No. 404/299-1288

e-Mail
rweaver@qcwdr.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 11

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 10
233 Peachtree St NE
Harris Tower Ste 1000
Atlanta, GA 30303-1504

Agency Website: www.nlrb.gov
Telephone: (404)331-2896
Fax: (404)331-2858

Download
NLRB
Mobile App

October 6, 2014

Todd Hardison
CREW ONE PRODUCTIONS, INC.
763 Trabert Ave NW Ste E
Atlanta, GA 30318-4245

Re: Crew One
Case 10-CA-138169

Dear Mr. Hardison:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney KERSTIN MEYERS whose telephone number is (404)331-4600. If this Board agent is not available, you may contact Supervisory Field Attorney LISA HENDERSON whose telephone number is (404)331-2889.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be

considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Claude T Harrell Jr.

CLAUDE T. HARRELL JR.
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CREW ONE Charged Party and **INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES** Charging Party	**Case 10-CA-138169**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on October 6, 2014, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Todd Hardison
CREW ONE PRODUCTIONS, INC.
763 Trabert Ave NW Ste E
Atlanta, GA 30318-4245

October 6, 2014
Date

Designated Agent of NLRB
Name

/s/ Paul E. Dorsey
Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CREW ONE PRODUCTIONS, INC.

and **Case 10-CA-138169**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

COMPLAINT

This Complaint is based on a charge filed by International Alliance of Theatrical Stage Employees (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Crew One, whose correct name is Crew One Productions, Inc. (Respondent), has violated the Act as described below.

1.

The charge in this proceeding was filed by the Charging Party on October 3, 2014, and a copy was served on Respondent by United States mail on October 6, 2014.

2.

At all material times, Respondent has been a Georgia corporation with an office and place of business located in Atlanta, Georgia, where it is engaged in providing technical labor staffing, including stagehands for various theatrical and industrial venues.

Exhibit 13

3.

In conducting its operations during the 12-month period preceding the filing of this charge, Respondent performed services valued in excess of $50,000 in states other than the State of Georgia.

4.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5.

At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

6.

At all material times, General Manager Jeff Jackson has been an agent of Respondent within the meaning of Section 2(13) of the Act.

7.

On April 23, 2014, a Decision and Direction of Election issued in Case 10-RC-124620 directing an election among all stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

8.

On May 7, 2014, Respondent filed with the Board a Request for Review of the Decision and Direction of Election referred to above in paragraph 7.

9.

Pursuant to the Decision and Direction of Election referred to above in paragraph 7, a mail ballot election was held, and ballots were mailed on May 19, 2014.

10.

On June 12, 2014, pursuant to instructions from the Board, the ballots were impounded.

11.

On August 21, 2014, the Board issued an Order denying Respondent's Request for Review of the Decision and Direction of Election as the request raised no substantial issues warranting review.

12.

On August 27, 2014, pursuant to the Board Order referenced above in paragraph 11, ballots were counted and a majority of the employees voted in favor of the Union.

13.

On September 4, 2014, pursuant to the authority vested in the Acting Regional Director by the Board, the Acting Regional Director issued a Certification of Representative certifying the Union as the exclusive collective-bargaining representative of Respondent's employees in an appropriate unit.

14.

The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

15.

At all times since September 4, 2014, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

16.

About September 8, 2014, and September 18, 2014, the Union, by letter, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

17.

Since about September 23, 2014, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit, asserting that the Unit is comprised of independent contractors, not employees, and further asserting that the Union is a direct competitor of the Employer.

18.

By the conduct described above in paragraph 17, Respondent has been failing and refusing to recognize and bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

19.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 6, 2014, or postmarked on or before November 5, 2014**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the

party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

Dated: October 23, 2014

MARY L. BULLS
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 10
233 Peachtree Street, NE
Harris Tower Suite 1000
Atlanta, Georgia 30303-1504

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CREW ONE

and **Case 10-CA-138169**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

AFFIDAVIT OF SERVICE OF: COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on , I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

Todd Hardison Crew One Productions, Inc. 763 Trabert Ave NW Ste E Atlanta, GA 30318-4245	**CERTIFIED MAIL, RETURN RECEIPT REQUESTED – 7014 1200 0000 1675 6158**
Robert M. Weaver , Attorney Quinn, Connor, Weaver, Davies & Rouco LLP 3516 Covington Hwy Decatur, GA 30032	**REGULAR MAIL**
William G. Trumpeter, Esq. Jay Y. Elliot, Esq. Miller & Martin, PLLC 832 Georgia Ave Ste 430 Chattanooga, TN 37402-2263	**REGULAR MAIL**
International Alliance of Theatrical Stage Employees 207 West 25th Street Fourth Floor New York City, NY 10001	**CERTIFIED MAIL - 7014 1200 0000 1675 6165**

October 23, 2014
Date

Yvette Davis, Designated Agent of NLRB
Name

/s/Yvette Davis
Signature

Exhibit 14

evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

CREW ONE PRODUCTIONS, INC.,	)	
	)	
Respondent,	)	
	)	
-and-	)	Case No. 10-CA-138169
	)	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,	)	
	)	
Charging Party.	)	

ANSWER

Comes now Respondent, Crew One Productions, Inc., through its undersigned counsel, and states as its Answer:

1. Respondent admits Paragraphs 1 through 11 of the Complaint.

2. In response to Paragraph 12 of the complaint, Respondent admits that the ballots were counted on August 27, 2014, and a majority of the individuals who cast ballots voted in favor of the Union. Respondent denies the remaining allegations of Paragraph 12 of the Complaint.

3. In response to Paragraph 13 of the Complaint, Respondent admits that on or about September 4, 2014, the Acting Regional Director issued a Certification of Representative certifying the Union as the exclusive collective bargaining representative of Respondent's employees in an appropriate unit. Respondent denies that the members of the unit in which the election was directed are employees. Respondent denies that the unit in which the election was conducted is an appropriate unit.

4. Respondent denies Paragraphs 14 and 15 of the Complaint.

5. Respondent admits Paragraphs 16 and 17 of the Complaint.

6. Respondent denies Paragraphs 18 and 19 of the Complaint.

DEFENSES

1. The Regional Director and the Board erred in not dismissing the petition in 10-RC-124620 since the members of the unit found appropriate for bargaining are not employees of Respondent.

2. The Regional Director and the Board erred in not dismissing the petition in 10-RC-124620 since Respondent's hiring hall operated by IATSE, Local 927 directly competes with the Respondent as a labor provider in the Atlanta Metropolitan area.

3. The Charging Party has been inappropriately certified.

WHEREFORE, having answered, Respondent demands that the Complaint be dismissed.

Respectfully submitted,

MILLER & MARTIN PLLC

By: _____
William G. Trumpeter

Suite 1000, Volunteer Building
832 Georgia Avenue
Chattanooga, TN 37402
Telephone: 423-785-8318
Facsimile: 423-785-8293
E-mail: btrumpeter@millermartin.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Answer has been filed with the Regional Director via electronic transmission through the agency's website, www.nlrb.gov. I further certify that a copy of the Answer has been mailed to Robert M. Weaver, Quinn, Connor, Weaver, Davies & Rouco LLP, 3516 Covington Highway, Decatur, GA 30032.

By: _____
William G. Trumpeter